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**THE CONCEPT OF LACK OF CONFORMITY: FROM
THE CISG TO THE PROPOSAL ON ONLINE SALE OF
GOODS**

Dissertação com vista à obtenção do grau de Mestre em
Direito e Gestão

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Abbreviations

Art.	Article
Arts.	Articles
B2B	Business to Business
B2C	Business to Consumer
CESL	Proposal for a Regulation on a Common European Sales Law
CISG	United Nations Convention on Contracts for the International Sale of Goods
CJEU	Court of Justice of the European Union
CSD	Directive 1999/44/EC of the European Parliament and of the Council of the 25 th of May 1999 on certain aspects of the sale of consumer goods and associated guarantees - Consumer Sale Directive
DCD	Proposal for a Directive on certain aspects concerning Contracts for the Supply of Digital Content- Digital Content Directive
Dec.	December
e.g.	For example
EU	European Union
i.e.	That is
p.	Page
PSCL	Decree-Law no. 67/2003 of 8 th April - Portuguese Sale of Consumer Goods Law
Oct.	October
OSD	Proposal for a Directive on certain aspects concerning Contracts for the Online and Other Distance Sales of Goods – Online Sales Directive
SME	Small and Medium Enterprises

ULIS	Uniform Law on the International Sale of Goods
UK	United Kingdom

Summary

The concept of conformity's main purpose is to protect the buyer insofar as requiring the seller to deliver goods that are in conformity to the contract and should the contract not foresee specific requirements for conformity, the actual legal instruments set forth legal requirements that have to be fulfilled.

We will be analysing in this paper the requirements for the conformity with the contract that are provided for in the contract as well as the legal requirements that are foreseen in all of the legal instruments under analysis. We will make a comparison of the requirements for conformity in all of the legal instruments in order to see the similarities and differences between them regarding each of the requirements.

We conclude that all the legal instruments impose the delivery of goods in conformity to the contract, defining legal criteria for conformity. Despite some differences between them, there are more similarities than differences.

Another conclusion that we came to was that it is important that the Digital Content Directive be adopted, due to the fact that concerning the supply of digital content there is uncertainty regarding whether or not the digital content conform with the contract as there are no legal rules regarding digital content.

Passwords: Conformity to the contract, criteria for conformity, lack of conformity; incorrect installation, third party rights.

Resumo

O objetivo principal do conceito de conformidade é proteger o comprador, impondo ao vendedor a entrega de bens que sejam conformes com o contrato. Caso o contrato não preveja requisitos específicos de conformidade, a lei estabelece requisitos que têm de ser cumpridos.

Iremos analisar no presente trabalho os requisitos de conformidade com o contrato que têm fonte contratual bem como os requisitos legais estabelecidos nos diplomas em análise. Faremos uma comparação dos requisitos de conformidade em todos os diplomas para verificar as semelhanças e as diferenças entre eles em relação a cada um dos requisitos.

Concluimos que todos os diplomas impõem a entrega de um bem em conformidade com o contrato, definindo critérios legais de conformidade. Apesar das diferenças, prevalecem as semelhanças.

Outra conclusão a que chegamos foi a importância da adoção da Diretiva sobre Conteúdos Digitais, uma vez que não existem regras legais que regulem, atualmente, os critérios de conformidade nos contratos relativos a conteúdos digitais.

Palavras-chave: Critério da Conformidade com o contrato; critérios de conformidade, falta de conformidade; má instalação, direitos de terceiros.

1. Introduction

The concept of conformity of the goods was first adopted by the Hague Convention relating to the Uniform Law on the International Sale of Goods (hereinafter called “ULIS”) of 1964¹ and later the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as “CISG”)² also adopted the concept of conformity of goods. The reason for these Conventions adopting the concept of conformity of the goods was mainly due to the changes in the way goods were produced and sold. Initially, goods were produced by the seller who was aware or should be aware of the qualities and defects of the goods he produced. In recent years, the goods are produced on a large scale and the seller no longer produces the goods he sells or controls their production so he is no longer aware or able to be aware of the lack of conformity of the goods. This change in the business model challenged the way the legal systems dealt with lack conformity of goods³. The legal systems established that the seller was only liable for defects in goods if he was aware or should have been aware of the defects. With these changes, the seller was not liable for the lack of conformity of goods as he no longer was able to be aware of the lack of conformity since he did not produce the goods. Neither the producer nor the previous seller in the sales chain were liable for the lack of conformity as they were not part of the sales contract. The ULIS and later the CISG established that the seller’s fault was no longer required. The seller is now required to deliver goods as well as to deliver goods which conform to the contract. These changes have led to greater protection of the buyer, from the traditional model which was based on “caveat emptor”, i.e., the buyer beware, to a model based on the delivery of goods in conformity, according to the “caveat venditor”, i.e., the seller beware⁴.

The CISG influenced many national legal systems with its concept of conformity of goods as well as the European Union’s legislator. The European Union (hereinafter called “EU”) adopted the concept of conformity with the contract in the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the Sale of

¹ Few countries adhered to the ULIS.

² On 11 April 1980 in Vienna, the UN Diplomatic Conference adopted the CISG. The CISG came into effect on 1 January 1988. Up until this date, the CISG has been ratified by eighty-five countries. Twenty-four out of the twenty-eight EU Member States have ratified the CISG, with the exception of Portugal, Ireland, Malta and the United Kingdom.

³ Carlos Ferreira de Almeida, “Orientações de Política Legislativa Adoptadas pela Directiva 1999/44/CE sobre venda de bens de consumo. Comparação com o Direito Português Vigente” in Themis – Revista da Faculdade de Direito da UNL, ano II, no. 4, Almedina, Coimbra, 2002, p. 110.

⁴ Carlos Ferreira de Almeida, Op. Cit., p. 112.

Consumer Goods and Associated Guarantees (hereinafter called “Consumer Sales Directive” or “CSD”), which was transposed to the legal systems of the Member States. The CSD is a minimum harmonisation Directive which allowed Member States to adopt or maintain in force more stringent provisions to ensure a higher level of consumer protection⁵. Portugal transposed the CSD by Decree-Law no. 67/2003 of 8 April (hereinafter called the “Portuguese Sale of Consumer Goods Law” or “PSCL”)⁶. The PSCL, is a special law, which explicitly introduced in the Portuguese legal system the concept of conformity to the contract.

In more recent years there have been further changes in the way business is done due to the internet. The internet has enabled goods to be sold on the internet, as well as the supply of digital content, internet platforms where goods are sold and services are supplied and the internet of things in which “things can buy things”. These changes have posed new challenges to contract law. The EU has taken into account these new situations in contract law with the European Commission’s Proposal for a Regulation on a Common European Sales Law (hereinafter referred to as CESL)⁷ in 2011 which included in its scope of application contracts for the supply of digital content. The CESL was withdrawn and the European Commission did not let go of its intention to establish rules for the supply of digital content and sales on the internet. In 2015 the European Commission made two proposals. One of the Proposals was the Proposal for a Directive on certain aspects concerning Contracts for the Supply of Digital Content⁸ (hereinafter called the “Digital Content Directive” or “DCD”) and the other the Proposal for a Directive on certain aspects concerning Contracts for the Online and Other Distance Sales of Goods⁹ (hereinafter referred to as “Online Sales Directive” or “OSD”). Both of these Proposals for Directives are part of the “Digital Single Market Strategy” adopted by the Commission on 6 May 2015¹⁰. They draw on the experience acquired during the negotiations for the CESL and have many similarities to the CESL, although they only deal with part of the subject matter that the CESL does. Both of these Proposals deal with the conformity to the contract in the type of contracts foreseen in each Proposal. The DCD¹¹ and the OSD¹²

⁵ Art. 8 (2) CSD.

⁶ The PSCL was changed by Decree-Law no. 84/2008 of 21 May.

⁷ Brussels, 11.10.2011, COM (2011) 635 final. 2011/0284 (COD)

⁸ Brussels, 9-12-2015, COM (2015) 634 final. 2015/0287 (COD)

⁹ Brussels, 9-12-2015, COM (2015) 635 final. 2015/0288 (COD)

¹⁰ COM (2015) 192 Final in: <http://ec.europa.eu/priorities/digital-single-market/>

¹¹ Art. 4 DCD.

¹² Art. 3 OSD.

are full harmonised Directives and provide that Member States cannot maintain or introduce provisions diverging from those laid down in the Directives, including more or less stringent provisions to ensure a different level of consumer protection. They do not leave room for Member States to have different rules from those laid down therein. The aim is for the level of consumer protection to be the same among the Member States.

This paper will be analysing the concept of lack of conformity in the CISG, CSD, PSCL, CESL, OSD and the DCD. The aim will be to see the evolution of the concept of conformity in the various legal instruments and understand their similarities as well as their differences. We will start by studying the scope of application of the legal instruments and then the conformity with the contract criteria and the legal criteria for conformity in all the legal instruments as well as looking at situations that are not considered lack of conformity.

2. Scope of Application of the Legal Instruments

2.1 Material Scope of Application

2.1.1 Types of Contracts covered

The CISG is applicable to contracts for the sale of goods between parties whose place of business are in different states according to article 1 (1). It is unclear whether the CISG is applicable to lease of goods contracts since it is not a sale of goods and the CISG only refers to sale of goods. Some authors maintain that the CISG is not applicable according to article 3 (2) CISG as the financing part in a lease contract is of greater importance than the sale part. The CISG is not applicable to sales by auction or on execution or otherwise by authority of law¹³. For some authors, barter contracts are excluded from the CISG as the CISG requires sales contracts to be an exchange of goods against money. There are others that consider the CISG applicable to barter contracts, due to the fact that the term “price” in the CISG is not restricted to money. Another debatable issue is whether distribution and franchising agreements are covered by the CISG. Jacob Ziegel maintains that the CISG is not applicable to the framework distribution contract which regulates the relationship between the parties, however the individual sales contracts which the parties conclude fall within the scope of the CISG¹⁴. The CISG considers contracts for the supply

¹³ Art. 2 (b) and (c) CISG.

¹⁴ Jacob Ziegel, in “The Scope of the Convention: Reaching Out to Article One and Beyond” in 25 Journal of Law and Commerce, 2005, p 61.

of goods to be manufactured or produced as sales contracts and thus the CISG is applicable to these contracts¹⁵. The CISG is applicable to the sales part as well as to the service part. However, if the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production then it is not considered a sales contract and the CISG is not applicable¹⁶. Courts resort to a quantitative test to determine whether the materials supplied by the buyer constitute a “substantial part”¹⁷. The CISG is not applicable to contracts when the preponderant part of the obligations of the party who furnishes the goods consist in the supply of labour or other services¹⁸. If the supply of labour or other services is not preponderant but the supply of goods is then the CISG is applicable to the contract on a whole. The “preponderant part” is something more than half, if the obligation to supply labour or services amounts to more than 50 per cent of the seller’s obligations, the CISG is not applicable¹⁹.

The CSD is applicable to sales of consumer goods contracts²⁰ and to contracts for the supply of consumer goods to be manufactured or produced²¹. The CSD does not establish any limitation to its applicability regarding whether or not the party who orders the goods undertakes to supply a substantial part of the materials necessary for the manufacture or production. The materials can be supplied by either the seller or the consumer, according to article 2 (3) CSD. The CSD is applicable to contracts when the installation of the goods by the seller or under his responsibility forms part of the contract of sale of the goods²². The CSD is not applicable to rendering of services namely after-sales service, mere repair or maintenance of goods that the consumer already has as there is no sales of goods. It is not applicable to consumer lease of goods contracts as it does not state that it is applicable to them.

¹⁵ Art. 3(1) CISG.

¹⁶ Art. 3 (1) CISG.

¹⁷ UNCITRAL – Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, United Nations, New York, 2016, p. 20.

¹⁸ Art. 3(2) CISG.

¹⁹ Some court decisions have stated that a contract for the delivery of goods also providing for the seller’s obligation to install the goods is covered by the CISG since the installation is generally minor in value compared to the sales obligations. The courts have held that the CISG is applicable to contracts for the delivery of goods that contain an obligation to train personnel or to provide maintenance services, if these additional obligations are only ancillary to the sales contract. UNCITRAL – Digest of Case Law, Op. Cit., p. 20.

²⁰ Art. 1 (1) CSD.

²¹ Art. 1 (4) CSD.

²² Art. 2 (5) CSD.

The PSCL is applicable to sales contracts concluded between professionals and consumers. It is applicable to consumer barter contracts, as according to article 939 Portuguese Civil Code the rules applicable to sales contracts are applicable to barter contracts, therefore the sales of consumer goods rules are also applicable to barter contracts in which consumer goods are involved²³²⁴. The PSCL is applicable to consumer goods supplied under a works contract or under a provision of services contract, as long as the goods that are delivered to the consumer are goods that he did not have before. This law is applicable to contracts when the professional transforms goods which belong to the consumer as long as the goods are transformed into goods that are different from what they were before the intervention by the professional²⁵. The PSCL does not exclude its applicability to works or provision of services when the party who ordered the goods undertook to supply a substantial part of the materials. According to article 2 (3) PSCL the materials can be supplied by the consumer or the seller. The PSCL is not applicable to mere repair or maintenance of goods that belong to the consumer, however it is applicable to the spare parts that are inserted in the goods during the repair²⁶. The PSCL is applicable to leasing of consumer goods²⁷, such as lease contracts, rental contracts, other forms of leases like financial leasing contracts, long term rental contracts and operational leasing of vehicles²⁸. It is applicable to the installation of goods when it forms part of the sales contract and the installation was made by the seller or under his responsibility²⁹. The PSCL and the CSD do not apply to consumer donation contracts as there is no sales in these contracts. Decree-Law no. 10/2015 of 16 January approved the Legal Regime of Access to and Exercise of Trade, Services and Restaurant Activities provides in article 34 (3) that the PSCL is applicable to provision of services within its scope of application and the concept of conformity is applicable to services within its

²³ Luís Manuel Teles de Menezes Leitão, in “O Novo Regime de Venda de Bens de Consumo”, in Estudos do Instituto de Direito do Consumo, Vol. II, Almedina, 2005, pg. 40. João Calvão da Silva, “Venda de Bens de Consumo - Comentário”, Almedina, Coimbra, 2010, p. 61. Jorge Morais Carvalho, Manual de Direito do Consumo, Almedina, Coimbra, p. 238 and 239.

²⁴ For some authors the CSD does not apply to barter contracts, it is applicable to contracts that are not sales in the technical sense of the Directive when it states its applicability thereto (article 1 (4)), in Christian-Twigg-Flesner/Robert Bradgate, in “The E.C. Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees – All Talk and No Do?”, in Web Journal of Current Legal Issues, 2, 2000.

²⁵ Jorge Morais Carvalho, Op. Cit., p. 240.

²⁶ Jorge Morais Carvalho, Op. Cit., p. 241.

²⁷ Art. 1-A (2) PSCL. The CSD does not foresee leasing of consumer goods, however Member States may adopt more stringent provisions to ensure a higher level of consumer protection under art. 8. The PSCL by including the leasing of consumer goods gives a higher level of consumer protection than the CSD in these contracts.

²⁸ Jorge Morais Carvalho, Op. Cit., p. 242.

²⁹ Art. 2 (4) PSCL.

scope. The Public Contracts Code (Decree-Law no. 18/2008 of 29 January) stipulates in article 441 (3) that in procurement contracts for the acquisition of movable goods that the PSCL is applicable, regarding the conformity of the goods to the contract.

The CESL can be used for cross-border sales contracts, contracts for the supply of digital content, irrespective of whether the digital content is supplied in exchange for the payment of a price³⁰³¹, and for related service contracts³², when the parties to a contract agree to do so³³. The CESL does not exclude its applicability to digital content supplied not in exchange of a price, when the supplier requests the consumer to provide personal data that the processing of which is strictly necessary for the performance of the contract or for meeting legal requirements or when other data is requested by the supplier in order to ensure that the digital content is in conformity with the contract or to comply with legal requirements and the supplier does not use that data for commercial purposes. According to the CESL all data provided by the consumer is to be considered counter-performance. The CESL is applicable to related service contracts³⁴, irrespective of whether a separate price was agreed for the related service³⁵. The CESL is applicable to a related service³⁶ which is any service related to goods or digital content, such as installation, maintenance, repair or any other processing, provided by the seller of the goods or the supplier of the digital content under the sales contract, the contract for the supply of digital content. The CESL is applicable even if the related service contract is separate from the sales contract or the contract for the supply of digital content as long as it is concluded at the same time as these contracts. There is no limitation to the CESL's applicability regarding the related service being a preponderant part of the obligations of the seller. The CESL is not applicable to related services regarding transport services, training services, telecommunications support services and financial services.

³⁰ Recital 18 Regulation on CESL establishes that "Digital content is often supplied not in exchange for a price but in combination with separate paid goods or services, involving a non-monetary consideration such as giving access to personal data or free of charge in the context of a marketing strategy based on the expectation that the consumer will purchase additional or more sophisticated digital content products at a later stage".

³¹ Art. 5 (b) Regulation on CESL.

³² Arts. 3 and 5 (a) to (c) Regulation on CESL.

³³ Art. 1 (1) Regulation on CESL.

³⁴ There is a distinct regime for obligations and remedies of the parties to a related service contract in the CESL in Part V.

³⁵ Art. 5 (c) Regulation on CESL.

³⁶ Art. 2 (m) Regulation on CESL.

The CESL can be used for “distance contracts”³⁷, “off-premises contracts”³⁸ as well as for on-premises contracts, as long as they are cross-border contracts according to article 4 Regulation on CESL. The CESL is applicable to contracts for the supply of goods to be manufactured or produced irrespective of who supplies the materials³⁹. It is applicable to consumer sales contracts when the goods or the digital content is installed by the seller or under the seller’s responsibility⁴⁰. The CESL is not applicable to contracts for the sale on execution or otherwise involving the exercise of public authority⁴¹. The CESL is applicable to public auctions where goods or digital content are offered by the trader to the consumer who attends or is given the opportunity to attend the auction in person⁴².

The CESL is not applicable to mixed purpose contracts including any elements other than the sale of goods, the supply of digital content and the provision of related services, for instance, to leasing contracts or donation contracts⁴³. It is not applicable to B2C contracts when the trader grants or promises to grant to the consumer credit in the form of deferred payment, loan or other similar financial accommodation⁴⁴. However, it is applicable when the trader grants or promises to grant credit to a trader, according to article 6 (2) a contrario. The CESL may be used for B2C contracts where goods, digital content or related services of the same kind are supplied on a continuing basis and the consumer pays for such goods, digital content or related services for the duration of the supply by means of instalments⁴⁵. This is also applicable to B2B contracts although it is not expressly stated as there is no limitation for these contracts regarding granting of credit.

The OSD is applicable to distance sales contracts concluded between the seller and the consumer⁴⁶, which are concluded under an organised scheme without simultaneous physical presence of the seller and the consumer, with the exclusive use of one or more means of distance communication, including via internet, up to and including the time at which the contract is concluded⁴⁷. The OSD is applicable to sales contract when there is

³⁷ Defined in art. 2 (p) Regulation on CESL.

³⁸ Defined in art. 2 (q) Regulation on CESL.

³⁹ Art. 2 (K) Regulation on CESL and 101 CESL.

⁴⁰ Art. 101 (a) CESL.

⁴¹ Art. 2 (K) Regulation on CESL.

⁴² Art. 2 (u) Regulation on CESL.

⁴³ Art. 6 (1) Regulation on CESL.

⁴⁴ Art. 6 (2) Regulation on CESL.

⁴⁵ Art. 6 (2) Regulation on CESL.

⁴⁶ Art. 1 (1) OSD.

⁴⁷ Art. 2 (2) OSD.

the installation of the goods by the seller or under his responsibility⁴⁸ and to contracts for goods to be manufactured or produced, irrespective of who supplies the materials⁴⁹. The OSD is not applicable to distance contracts for the provision of services. However, when the sales contracts provide for the sale of goods as well as the provision of services, the OSD will only apply to the part relating to the sales of goods and not to the service part of the contract⁵⁰.

The DCD applies to contracts for the supply of digital content to consumers⁵¹. The DCD makes no reference to any type of contract, like sales contracts or service contracts. The DCD is applicable to distance sales as well as to on-premises sales⁵² which is clear from the fact that the DCD applies to durable medium incorporating digital content when the durable medium is used exclusively as carrier of digital content⁵³. Differently, the OSD is not applicable to digital content supplied in this way⁵⁴. The DCD applies to contracts where the digital content is supplied to the consumer in exchange for a price that is to be paid or the consumer actively provides counter-performance other than in money in the form of personal data or any other data⁵⁵. The DCD is not applicable to digital content provided against counter-performance other than money when the supplier requests the consumer to provide personal data, the processing of which is strictly necessary for the performance of the contract (e.g. geographical location where necessary for a mobile application to function properly) or for the sole purpose of meeting legal requirements (e.g. when the registration of the consumer is required for security and identification purposes by the applicable laws) and the supplier does not further process them in a way incompatible with this purpose⁵⁶. The DCD does not apply to any other data the supplier requests the consumer to provide for the purpose of ensuring that the digital content is in conformity with the contract or of meeting legal requirements, and the supplier does not use that data for commercial purposes⁵⁷. Recital 14 states that the DCD should only apply to contracts where the supplier requests and the consumer actively provides data, such as

⁴⁸ Art. 6 (a) OSD.

⁴⁹ Art. 2 (a) OSD.

⁵⁰ Art. 1 (2) OSD.

⁵¹ Art. 1 DCD.

⁵² The trader may provide an access code in order for the consumer to download or access the digital content from a website or with a copy of the digital content on a durable medium like a DVD or CD.

⁵³ Art. 3 (3) DCD.

⁵⁴ Art. 1 (3) OSD.

⁵⁵ Art. 3 (1) DCD. Recital 13 and 14 DCD.

⁵⁶ Art. 3 (4) DCD.

⁵⁷ Art. 3 (4) DCD.

name and e-mail address or photos, directly or indirectly to the supplier for example through individual registration or on the basis of a contract which allows access to consumers' photos. It adds that the DCD should not apply to situations where the supplier collects information, including personal data, such as the IP address or other automatically generated information like information collected and transmitted by a cookie, without the consumer actively supplying it, even if the consumer accepts the cookie. It is also not applicable when the consumer is exposed to advertisements exclusively in order to gain access to digital content. It seems that data are only considered as counter-performance for the supply of digital content when the data is intended or can be used for commercial purposes by the supplier. The DCD is not applicable when the consumer does not actively provide the counter-performance in the form of personal data or any other data, like when he does not register or does not explicitly give access to his data. Thus, open access data, open source software or free computer programs (freeware) are not covered by the DCD because they do not require registration. When the consumer must have a personal account which he has to register for in order to have access to digital content then the DCD is applicable.

When a contract includes elements in addition to the supply of digital content, the DCD is only applicable to the obligations and remedies of the parties as supplier and consumer of the digital content and not to the other elements⁵⁸⁵⁹. The DCD is not applicable to contracts regarding services performed with a predominant element of human intervention by the supplier where the digital format is used mainly as a carrier⁶⁰. Recital 19 states that the DCD is only applicable to services whose main subject matter is providing digital content. The DCD is not applicable to services that are performed personally by the supplier and the digital means are only used for access or for delivery purposes⁶¹. The DCD does not apply to contracts on electronic communication services

⁵⁸ Art. 3 (6) DCD.

⁵⁹ Recital 20 DCD establishes that "Where, under a contract or a bundle of contracts, the supplier offers digital content in combination with other services such as telecommunication services or goods, which do not function merely as a carrier of the digital content, this Directive should only apply to the digital content component of such a bundle. The other elements should be governed by the applicable law".

⁶⁰ Art. 3 (5) (a) DCD.

⁶¹ For example a translation made by a translator and delivered by e-mail. Recital 10 DCD.

as defined in Directive 2002/21/EC⁶²; to contracts regarding healthcare as defined in article 3 (a) Directive 2011/24/EU⁶⁴; to contracts for gambling services which involve wagering a stake with monetary value in games of chance, including those with an element of skill, such as lotteries, casino games, poker games and betting transactions, by electronic means and at the individual request of a recipient of a service; as well as to contracts regarding financial services⁶⁵. The creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creations of other users is excluded from the concept of digital content and thus the CESL is not applicable, however the DCD does not exclude them from its applicability.

2.1.2 Types of Goods

The CISG is applicable to contracts for the sale of tangible movable goods⁶⁷, regardless if they are new or used⁶⁸. The CISG is not applicable to goods bought for personal, family or household use, i.e., consumer goods, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for such use⁶⁹. The CISG does not apply to stocks, shares, investment securities, negotiable instruments or money; ships, vessels, hovercraft or aircraft; as well as to electricity⁷⁰. The CISG is not applicable to intangibles like intellectual property rights or goodwill⁷¹. It is debatable whether the sale of computer software is considered “sale of goods” and within the CISG’s scope of application. Some authors maintain that software on a physical media like a disk is considered goods as it is tangible, but software is not

⁶² “Electronic communications service means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Art. 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks”, under art. 2 (c) Directive 2002/21/EC of 7 March 2002.

⁶³ Art. 3 (5) (b) DCD.

⁶⁴ “Healthcare means health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices”, under art. 3 (a) Directive 2011/24/EU of 9 March 2011.

⁶⁵ Art. 3 (5) DCD.

⁶⁶ Paypal and bitcoins are not within the scope of the DCD.

⁶⁷ Art. 1 (1) CISG.

⁶⁸ UNCITRAL – Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, p. 7.

⁶⁹ Art. 2 (a) CISG.

⁷⁰ Art. 2 (d) to (f) CISG.

⁷¹ UNCITRAL – Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, p. 7.

goods when it is delivered via a non-physical medium, for instance over the internet⁷². The prevailing view is that the CISG applies to software irrespective of whether the software is delivered electronically, for instance via the internet, or whether it is delivered on tangible media such as a CD⁷³. According to Frank Ferrari and Harry Fletchner⁷⁴, the sale of software, other than custom-made software and standard software that is modified to fit the purposes of the buyer⁷⁵, is governed by the CISG, “at least when the software is incorporated in corporeal goods”. The reason given by these authors for excluding contracts for the sale of custom-made software, even if incorporated on tangible goods, is article 3 (2) in that in this type of sales “the labour or service part will generally be preponderant, where this is not the case, even custom-made software can fall under the CISG”⁷⁶.

The CSD is applicable to sales of tangible movable goods⁷⁷, it is not applicable to immovable goods or to intangible goods. “Consumer goods” does not include goods sold by way of execution or otherwise by authority of law; water and gas where they are not put up for sale in a limited volume or set quantity; and electricity⁷⁸, therefore the CSD is not applicable to the sales of these goods. The continuous supply of water, gas and electricity are excluded from the scope of application of the CSD, but the sale of water and gas in limited quantities (e.g. the sale of bottles of water or gas containers) falls within its scope of application. The question is raised as to whether the CSD is applicable to digital content such as software programs or music. The CSD is applicable to tangible goods thus when the digital content are on a physical media it is applicable to the tangible media. The CSD is not applicable to the digital content itself as it is thought for tangible

⁷² Kristian Maley, in “The Limits to the Conformity of Goods in the United Nations Convention on Contracts for the International Sale of Goods (CISG)”, in 12 International Trade & Business Law Review, 2009 p. 3 and 4.

⁷³ Peter Schlechtriem, in “Schlechtriem & Schwenzer, CISG Commentary”, 2005. Joseph Lookofsky, in “In Dubio Pro-Conventione? Some Thoughts about Opt-Outs, Computer Programs and Preemption under the 1980 Vienna Sales Convention (CISG)”, in Duke Journal of Comparative & International Law, Vol. 13, No. 3, 2003 p 276 and 277.

⁷⁴ Frank Ferrari and Harry Fletchner, in “The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the UN Sales Convention”, Ronald A. Brand, European Law Publishers, Sellier, 2004, p. 77 and 78.

⁷⁵ Joseph Lookofsky, Op. Cit., p 278, argues that the development and sale of tailor-made programs fall within the CISG ambit.

⁷⁶ Frank Ferrari and Harry Fletchner, Op. Cit., p. 78.

⁷⁷ Art. 1 (2) (b) CSD.

⁷⁸ Art. 1 (2) (b) CSD.

goods and it does not have specific rules for digital content⁷⁹. When the digital content is downloaded or streamed it is not applicable since it is intangible goods⁸⁰.

Member States are allowed to exclude from “consumer goods”, when transposing the CSD, second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person⁸¹, in those cases the regime established in the Member States law will not include this type of goods. The CSD is applicable to second-hand goods, although it is not expressly stated but this can be taken a contrario from article 1 (3) that allows Member States to provide that the expression “consumer goods” does not cover second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person. Moreover, article 7 (1) allows Member States to provide that, in the case of second-hand goods, that the seller and the consumer may agree contractual terms or agreements which have a shorter time period for the liability of the seller, adding that such period may not be less than one year. Recitals (8) and (16) also refer to second-hand goods.

The PSCL is applicable to sales contracts of consumer goods which are *immovables or tangible movable goods*⁸². It is applicable to second-hand goods. The PSCL has a larger scope of application than the CSD as it is applicable to immovable goods which the CSD is not. The PSCL is not applicable to intangible goods like patents, copyright, databases, intellectual assets or rights. Questions have been raised regarding computer programmes or music that is downloaded whether the PSCL is applicable. When the software programmes are on a CD or DVD, i.e., on a physical medium then they are tangible goods and the PSCL is applicable. But if the file is downloaded from the internet then it is intangible goods and the PSCL is not applicable. There are authors that argue that the media on which the digital content is on does not matter, the PSCL is applicable regardless of it being on a physical media⁸³. The PSCL, unlike the CSD, is applicable to

⁷⁹ Marco B.M. Loos and Chantal MAK, in “Remedies for Buyers in case of Contracts for the Supply of Digital Content, Policy Department C: Citizens’ Rights and Constitutional Affairs, European Parliament, 2012, in <http://www.europarl.europa.eu/studies>, p. 7. Rosa Milà Rafel, in “The Directive Proposals on Online Sales and Supply of Digital Content (Part I): Will the new rules attain their objective of reducing legal complexity?”, in IDP no. 23, Revista D’Internet Derecho y Política, December, 2016, p. 10.

⁸⁰ There are authors that maintain that the type of media is not relevant and that the CSD is applicable whether or not the digital content is supplied on a physical media. Robert Bradgate and Christian Twigg-Flesner, Blackstone’s Guide to Consumer Sales and Associated Guarantees, Oxford, 2003, p. 30.

⁸¹ Art. 2 (3) CSD.

⁸² Art. 1-B (b) PSCL.

⁸³ Jorge Morais Carvalho, Op. Cit., p. 237. Paulo Mota Pinto, “Conformidade e Garantias na Venda de Bens de Consumo”, in Estudos de Direito do Consumidor, No. 2, Almedina, Coimbra, 2000, p. 217.

water, gas and electricity⁸⁴. The PSCL is applicable to second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person⁸⁵ as well as when they do not have the opportunity of attending the sale in person.

The CESL is applicable to tangible movable goods⁸⁶, thus it is not applicable to immovables. Electricity, natural gas, water and other types of gas⁸⁷ are excluded from the concept of goods and thus the CESL is not applicable to them. However, when water and other types of gas are put up for sale in a limited volume or quantity (e.g. bottles of water) then they are considered goods and the CESL is applicable. The CESL does not refer that it is applicable to second-hand goods, seeing that it does not exclude its applicability to these types of goods, it is applicable to second-hand goods.

The CESL is applicable to digital content supplied on a tangible medium like a CD or DVD and to digital content made available through mobile or internet connections, which can be stored, processed or accessed, and re-used by the user⁸⁸. Digital content is data which are produced and supplied in digital form, whether or not according to the buyer's specifications, including video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalise existing hardware or software⁸⁹. The following types of digital content are excluded from the CESL's scope of application: financial services, including banking services; legal or financial advice provided in electronic form; electronic healthcare services; electronic communications services and networks and associated facilities and services; gambling as well as the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creations of other users.

The DCD is applicable to digital content⁹⁰, which is data which is produced and supplied in digital form, for example video, audio, applications, digital games and any other software⁹¹. Moreover, digital content is a service allowing the creation, processing or

⁸⁴ João Calvão da Silva, *Op. Cit.*, p. 59 and 60. Jorge Morais Carvalho, *Op. Cit.*, p. 238.

⁸⁵ The PSCL did not use the possibility given by the CSD of excluding these types of sales from the concept of "consumer goods".

⁸⁶ Art. 2 (h) Regulation on CESL.

⁸⁷ Art. 2 (h) Regulation on CESL.

⁸⁸ Art. 5 (b) Regulation on CESL.

⁸⁹ Art. 2 (j) Regulation on CESL.

⁹⁰ Art. 3 (1) DCD.

⁹¹ Art. 2 (1) (a) DCD.

storage of data in digital form, where such data is provided by the consumer⁹²⁹³, as well as a service which allows sharing of and other interaction with data in digital form provided by other users of the service⁹⁴⁹⁵. Digital content includes all kinds of digital data, regardless of whether supplied on a tangible medium, downloaded or webstreamed. The concept of digital content is a broad concept and the reason for this is to “*cater for fast technological developments and to maintain the future proof nature of the notion of digital content*”⁹⁶.

The DCD is not applicable to digital content that is embedded in goods in such a way that it operates as an integral part of the goods and its functions are subordinate to the main functionalities of the goods⁹⁷. Goods with “embedded digital content” are smart goods that are excluded from the application of the DCD. The CSD is applicable to smart goods as they are tangible movable goods. The DCD is not applicable to issues of liability related to the Internet of Things, including liability for data and machine-to-machine contracts⁹⁸. The national laws are applicable to them. The DCD applies to contracts for the supply of digital product developed according to consumer’s specifications⁹⁹. The DCD is applicable to durable medium incorporating digital content¹⁰⁰ where the durable medium has been used exclusively as carrier of the digital content¹⁰¹. The DCD applies to the supply of visual modelling files required in the context of 3D printing, however it does not apply to the goods produced with the use of 3D printing technology¹⁰², the CSD is applicable as they are tangible movable goods.

The OSD is applicable to distance sales contracts of tangible movable goods¹⁰³. It is not applicable to items sold by way of execution or otherwise by authority of law; water, gas

⁹² Art. 2 (1) (b) DCD.

⁹³ Recital 15 DCD refers to digital images, video and audio files, blogs discussions forums, text-based collaboration formats, posts, chats, tweets, logs, podcasting, content created on mobile devices, content created in the context of online virtual environments, ratings and collections of links referring to online content.

⁹⁴ Art. 2 (1) (c) DCD.

⁹⁵ Includes any kinds of social media platforms where users interact with data that is not theirs by placing a like, commenting or reposting or sharing, e.g. Facebook.

⁹⁶ Recital 11 DCD.

⁹⁷ Recital 11 DCD.

⁹⁸ Recital 17 DCD.

⁹⁹ Art. 3 (2) DCD. Recital 16 DCD states that the DCD is applicable to contracts for the development of digital content tailor made to the specific requirements of the consumer including tailor made software.

¹⁰⁰ For example CDs or DVDs.

¹⁰¹ Art. 3 (3) DCD.

¹⁰² Recital 16 DCD.

¹⁰³ Arts. 1 (1) and 2 (d) OSD.

and electricity. However, when water, gas and electricity are put up for sale in a limited volume or a set quantity the OSD is applicable to them¹⁰⁴. The OSD does not state whether it is applicable to second-hand goods but as it does not expressly establish its inapplicability, it is applicable to them. The OSD does not apply to the durable medium incorporating digital content where the durable medium is used exclusively as a carrier for the supply of the digital content to the consumer¹⁰⁵¹⁰⁶. The OSD is applicable to the sale of smart goods when it is a distance sale contract¹⁰⁷.

2.2 Personal Scope of Application

The CISG is not applicable to sales of goods bought by consumers for personal, family or household use, unless the seller at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for such use¹⁰⁸¹⁰⁹. According to the doctrine's dominant view, the CISG is not applicable when the goods are used *solely* for private use, thus if the goods are used in dual purpose contracts (for private use and professional use) the CISG is applicable¹¹⁰. The CISG applies to B2B sales. The nationality of the parties or the civil or commercial character of the parties or of the contract is not to be taken into consideration in determining the application of the CISG to the contract¹¹¹.

The CSD is applicable to the sale of consumer goods¹¹². The CSD defines consumer as a “*natural person who acts for the purposes which are not related to his trade, business or*

¹⁰⁴ Art. 2 (d) (a) and (b) OSD.

¹⁰⁵ Article 1 (3) OSD.

¹⁰⁶ Recital 13 OSD establishes that the OSD does not apply to goods like DVDs and CDs incorporating digital content in such a way that the goods function only as a carrier of the digital content.

¹⁰⁷ Recital 13 OSD states that the OSD applies to digital content integrated in goods such as household appliances or toys where the digital content is embedded in such a way that its functions are subordinate to the main functionalities of the goods and it operates as an integral part of the goods.

¹⁰⁸ Art. 2 (a) CISG.

¹⁰⁹ Dário Moura Vicente, in “Desconformidade e Garantias na Venda de Bens de Consumo: Directiva 1999/44/CE e a Convenção de Viena de 1980”, in Themis, Year II, no. 4, 2001, p. 128, gives an example when the CISG is applicable despite the goods being sold for private use by the buyer, when the seller does not know nor ought to have known that the goods were bought for such a use, i.e., the sale of a computer to a lawyer who intends to only use it at his home, but he ordered it using the law firm's letterhead or the law firm's e-mail without disclosing in the order or afterwards the intended purpose of the computer. The author maintains that the CISG is applicable to this type of sales of consumer goods which seem to be sales to professionals.

¹¹⁰ Sara Larcher, “Contratos celebrados através da Internet: Garantias dos Consumidores contra Vícios na Compra e Venda de Bens de Consumo”, in Estudos do Instituto de Direito do Consumo, Vol. II, Almedina, Coimbra, 2005, p 161. Dário Moura Vicente, Op. Cit., p. 128.

¹¹¹ Art. 1 (3) CISG.

¹¹² Art. 1 (1) CSD.

profession”¹¹³. Legal persons are not considered consumers. Natural persons are not always consumers, they are only consumers when they are acting for the purposes which are not related to their trade, business or profession. The seller is defined as “*any natural or legal person who under a contract sells, consumer goods in the course of his trade, business or profession*”¹¹⁴. The seller can be a natural or a legal person and should sell the goods in the course of his trade, business or profession which should be regular, stable and durable¹¹⁵. The CSD is not applicable to B2B contracts, when a professional sells goods to another professional, whether or not they are used in his professional activity¹¹⁶. The CSD does not apply to sales between non-professionals, when a non-professional person sells goods to another non-professional person because the non-professional is not selling goods in the course of his trade or profession. The CSD is not applicable when a professional buys goods from a consumer.

The PSCL applies to sales contracts concluded between professionals and consumers¹¹⁷. Consumer is defined as “*the person to whom goods or services are supplied to or any other rights transferred to, for a non-professional use, by a person which performs an economic activity on a professional basis and whose purpose is to gain profits*”¹¹⁸. The PSCL does not stipulate that a consumer is a natural person, rather referring to “*person*”. In principle, the PSCL can be applicable to natural and legal persons, however the teleological element, i.e., the non-professional use of the goods needs to be taken into account in order to decide if legal persons are or not consumers¹¹⁹. A natural person who buys goods for his personal use is considered a consumer. A professional natural person who buys goods outside his professional activity for his personal use is also a consumer. In the case of companies or other type of legal persons that are incorporated to pursue a professional activity¹²⁰ the goods bought by these legal persons can only be for professional purposes thus they are not consumers, even if the goods are not to be resold or used in their economic activity and whether or not it has specific knowledge of the

¹¹³ Art. 1(2) (a) CSD.

¹¹⁴ Art. 1 (2) c) CSD.

¹¹⁵ It need not be in the course of his main business or profession.

¹¹⁶ Dário Moura Vicente, Op. Cit., p. 127; Paulo Mota Pinto, Op. Cit., , p. 214; and Jorge Pegado Liz, “Acerca das garantias a venda de bens de consumo. Da perspectiva comunitária ao direito interno português”, in Forum Iustitiae, no. 8, 2000, p. 52.

¹¹⁷ Art. 1-A (1) PSCL.

¹¹⁸ Art. 1-B (a) PSCL.

¹¹⁹ Jorge Morais Carvalho, Op. Cit., p. 24. Carlos Ferreira de Almeida, Op. Cit., p. 30.

¹²⁰ According to art. 160 Portuguese Civil Code and art. 6 (1) Portuguese Companies Code.

business¹²¹. Only legal persons that do not have an economic activity are included in the concept of consumer, such as associations and foundations, when they are acting in their capacity in which they do not have a profit purpose as the goods that they buy are for a non-professional purpose. However, if they have a coffee shop on their premises and buy goods to sell therein then those goods are for professional use and they are not consumers in that relation. The seller must “*perform an economic activity on a professional basis*”, on a regular, stable and durable basis, however it does not have to be his exclusive or sole activity. The seller can be a natural or a legal person as the PSCL refers to “person”. If the seller does not perform an economic activity then the contract is concluded between non-professionals and the PSCL is not applicable. Therefore, the PSCL is not applicable to sales contracts concluded between two professionals, to sales contracts concluded between non-professionals as well as when a professional buys goods from a non-professional. Another question that is raised is whether the CSD and the PSCL are applicable when consumer goods are bought from a professional when he is not acting in the course of his trade, business or profession¹²².

In dual purpose contracts¹²³, when the buyer uses the goods in his personal life and in his profession, the authors have different positions regarding whether the CSD or the PSCL is applicable. For some authors the goods have to be bought *exclusively* for personal or private use, any use that is not private or personal of the goods excludes the applicability of the CSD and the PSCL¹²⁴. The Court of Justice of the EU (hereinafter referred to “CJEU”) considered that any connection of the goods bought with professional activity was enough for the person not to be considered as a consumer and that only contracts concluded for the purposes of private needs¹²⁵ were considered consumer contracts. There are other authors that consider that the CSD and the PSCL is applicable when the person acts for purposes *partly* not related to his trade, business or profession. The prevailing

¹²¹ Jorge Morais Carvalho, Op. Cit., p. 26. Differently, Sara Larcher, Op. Cit., p. 156-157, extends the concept of consumer to the professional that is not a specialist.

¹²² Luís Manuel Teles de Menezes Leitão, in Op. Cit., p. 42, argues that the CSD is not applicable when consumer goods are bought from a professional who is not acting in the course of his normal activity and gives an example of a lawyer who sells to a non-professional a computer used in his office to state that the CSD is not applicable. Christian Twigg-Flesner/Robert Bradgate, Op. Cit, state that the CSD is not applicable in cases when the professional sells goods when the professional’s action does not coincide with his profession.

¹²³ A lawyer who buys a car that he uses for work purposes but he also uses it for private use.

¹²⁴ Luis Manuel Teles de Menezes Leitão, Op. Cit., p. 42. Judgement of the Portuguese Supreme Court of Justice of 20 October 2011 (case no. 1097/04.0TBLL.E1.S1) decided that it is irrelevant the private use given to the vehicle, if the vehicle was bought for a professional purpose.

¹²⁵ Judgement of 3 July 1997 by the CJEU, Case C-269/95, Francesco Benincasa vs Dentalkit Srl.

position is that the CSD and the PSCL is applicable when the goods are used *predominantly* for private use¹²⁶. If the use given to the goods is predominantly professional then neither the CSD nor the PSCL are applicable.

The CESL may be used in contracts with consumers¹²⁷ as long as the seller of goods or the supplier of the digital content is a trader as well as when all parties to a contract are traders but at least one of the parties is an SME¹²⁸. A Member State may decide to make available the CESL to contracts where all the parties are traders and none of them is an SME, according to article 13 (b) CESL.

The OSD is applicable to distance sales contracts between the seller and the consumer¹²⁹¹³⁰, thus it only applies to B2C contracts. The OSD defines seller¹³¹ as any natural or legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession. This definition is more complete than that found in the CSD and the CESL differing from them since it states that it does not matter whether the seller is privately or publicly owned and whether it is the actual person acting or someone in his name or on his behalf. A question that is raised regarding the OSD is whether it applies to online platforms that sell goods. When the platform is an online store of a brand (e.g. Zara Online), the platform is selling the goods as a seller and therefore the OSD is applicable. When an online platform, like e-bay or Amazon, sells goods of a certain brand, the question that is raised is whether the platform can be regarded as a “seller” within the scope of the OSD. Seller is defined as any natural person or any legal person who is acting, including “*through any other person acting in his name or on his behalf*”. It is necessary to see according to the national law of each country what is regarded as “acting in his name or on his behalf”, if the online platform is considered

¹²⁶ Jorge Morais Carvalho, Op. Cit., p. 27. Carlos Ferreira de Almeida, Op. Cit., p. 35. Oporto Appeal Court’s judgement of 29-05-2014 (case no. 2287/07), held that what is relevant is the “main use of the vehicle”, it was proven that the vehicle was also used for professional purposes but the main use of the vehicle was private, the court concluded that the PSCL was applicable.

¹²⁷ Consumer is defined in basically the same way as in the CSD in art. 2 (f) Regulation on CESL and trader is defined in art. 2 (e) Regulation on CESL.

¹²⁸ According to art. 7 (2) Regulation on CESL, an SME is a trader which employs less than 250 persons and has an annual turnover that does not exceed EUR 50 million or an annual balance sheet total which does not exceed EUR 43 million, or, for SME which has its habitual residence in a Member State whose currency is not the euro or in a third country, the equivalent amounts in the currency of that Member State or third country.

¹²⁹ Art. 1 (1) OSD.

¹³⁰ Art. 2 (b) OSD defines consumer in the same way as in the CESL.

¹³¹ Art. 2 (c) OSD.

according to national law as acting on behalf of the brand then these platforms could be considered as sellers within the scope of application of the OSD.

The DCD is applicable to contracts where the supplier supplies digital content to consumers¹³². The definition of consumer and supplier herein is the same as that in the OSD. A question that is raised is whether the DCD is applicable to online platforms that provide data produced and supplied in digital form or when they provide a service allowing the creation, processing or storage of data in digital form when the data is provided by the consumer¹³³. When the online platforms provide the data or services in their name then the DCD is applicable. Questions are raised when the digital platforms do not provide the data in their own name, as to whether the DCD is applicable to these Online Platforms and thus are considered suppliers. It all depends on what the laws of the Member States consider as “*any person acting in his name or on his behalf*” as to whether or not the online platforms can be considered suppliers within the scope of the DCD.

2.3 Territorial Scope of Application

The CISG applies to contracts for the sale of goods between parties, whose places of business are in different states¹³⁴ when the states are Contracting States of the CISG or when the rules of private international law lead to the application of the law of a Contracting State,¹³⁵¹³⁶ unless the Contracting States declared that they are not bound by the public international law rules that lead to the application of the CISG¹³⁷. The CISG is automatically applicable to contracts when these conditions are met, as long as the parties have not excluded the application of the CISG to their contract, under article 6 CISG. The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from dealings between or from information disclosed by the parties before or at the conclusion of the contract¹³⁸.

¹³² Arts. 1 (1) and 3 (1) DCD.

¹³³ Video sharing platforms or social networks.

¹³⁴ Art. 10 CISG establishes criteria for determining the place of business of a party.

¹³⁵ Art. 1 (1) CISG.

¹³⁶ In Portugal, the applicable Private International Law to contractual obligations is the Rome I Regulation. According to art. 3 Rome I Regulation, the contract is governed by the law chosen by the parties. Should the parties not choose a law applicable to their contract, the law governing the contract for the sale of goods is the law of the country where the seller has his habitual residence (art. 4 (1) (a) Rome I Regulation). If the parties choose the law of a Contracting State of the CISG to be applicable, the CISG is applicable to the contract. If the seller has his habitual residence in a Contracting State of the CISG then the CISG is applicable.

¹³⁷ Art. 95 CISG. China, Singapore, the Czech Republic, Slovakia and the USA made declarations under art. 95 CISG.

¹³⁸ Art. 1 (2) CISG.

The CISG does not foresee the point in time to determine whether the parties have places of business in different States.

The CSD is addressed to Member States, which have to transpose it by adopting provisions of national law that comply with the measures foreseen in the CSD¹³⁹. The CSD is applicable to sales made on premises or to sales made online and by other distance means¹⁴⁰. It is applicable to domestic sales as well as to international sales when article 6 Rome I Regulation establishes the competence of the law of a Member State of the EU. Article 7 (2) CSD establishes that Member States shall take the necessary measures to ensure that consumers are not deprived of the protection afforded by the CSD as a result of opting for the law of a non-member State as the law applicable to the contract when the contract has a close connection with the territory of the Member State. In the case that the law chosen gives the consumer less protection than that of the national laws that transposed the CSD then the national laws adopted in transposition of the CSD will be applicable.

The PSCL is applicable to consumer sales contracts that are domestic contracts as well as to international consumer sales contracts when according to the Rome I Regulation the Portuguese law is applicable. According to article 11 PSCL, if a sales contract is concluded between a professional and a consumer which has a close connection with the territory of an EU Member State, the choice of a law of a Non-Member State as the applicable law to the contract which is less favourable to the consumer will not deprive the consumer of the rights granted under the PSCL. The PSCL is applicable to on premises contracts as well as to online or distance sales contracts.

The CESL may be used for cross-border contracts if the parties agree that the CESL governs their cross-border contracts¹⁴¹. The CESL is only applicable if the contracting parties choose it. The CESL is not applicable to sales within a Member-State, however article 13 Regulation on CESL enables Member States to make the CESL available for contracts where the habitual residence of the traders, or in the case of a B2C contract, the habitual residence of the trader, the address indicated by the consumer, the delivery address for goods and the billing address are located in that Member State, i.e., to

¹³⁹ Art. 11 Consumer Sales Directive.

¹⁴⁰ The OSD establishes in art. 19 an amendment to be made to art. 1 (1) CSD in order for the latter to only be applicable to on premises sales and not to distance sales contracts as these will fall within the scope of the OSD.

¹⁴¹ Art. 3 Regulation on CESL

contracts that are not cross-border contracts. A B2B contract is considered a cross-border contract if the parties have their habitual residence in different countries of which at least one is a Member State¹⁴². The habitual residence of companies and other bodies, corporate or unincorporated is the place of central administration. The habitual residence of a trader who is a natural person is where that person's principal place of business is¹⁴³. Should the contract be concluded in the course of operations of a branch, agency or any other establishment of a trader, the place where the branch, agency or any other establishment is located is treated as the trader's habitual residence¹⁴⁴. A B2C contract is a cross-border contract if either the address indicated by the consumer, the delivery address for goods or the billing address are located in a country other than the country of the trader's habitual residence and at least one of these countries is a Member State¹⁴⁵. The relevant point in time for determining whether a contract is a cross-border contract is the time of the agreement on the use of the CESL.

The use of the CESL requires an agreement of the parties to that effect¹⁴⁶. The agreement on the use of the CESL in B2B relations can be explicit or implicit¹⁴⁷. The CESL in B2B contracts can be chosen partially, under article 8 (3) Regulation on CESL a contrario. In B2B contracts, the consent does not need to be given in a separate statement from the statement agreeing to conclude the contract. In B2C relations the agreement on the use of the CESL is only valid if the consumer's consent is given by an explicit statement which is separate from the statement indicating the agreement to conclude a contract¹⁴⁸ and the trader must provide the consumer with a confirmation of that agreement on a durable medium¹⁴⁹. In B2C contracts the CESL may not be chosen partially, but only in its entirety¹⁵⁰ and the trader is required to draw the consumer's attention to the intended application of the CESL before the agreement, by providing the consumer with a standard

¹⁴² Art. 4 (2) Regulation on CESL.

¹⁴³ Art. 4 (4) Regulation on CESL.

¹⁴⁴ Art. 4 (5) Regulation on CESL.

¹⁴⁵ Art. 4 (3) Regulation on CESL.

¹⁴⁶ Art. 3 Regulation on CESL.

¹⁴⁷ Martijn W. Hesselink, in "How to Opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation", in *European Review of Private Law*, Vol. 1, 2012, p. 8.

¹⁴⁸ The agreement to use the CESL should be given either in a separate document or in a separate paragraph in the contract.

¹⁴⁹ Art. 8 (2) Regulation on CESL.

¹⁵⁰ Art. 8 (3) Regulation on CESL. The reason for this is given by recital 24 CESL, which is to avoid a selective application of certain elements of the CESL which could disturb the balance between the rights and obligations of the parties and thus adversely affect the level of consumer protection.

information notice¹⁵¹ in a prominent manner¹⁵². If the trader fails to provide the information notice, the consumer shall not be bound by the agreement¹⁵³ until he has received the confirmation of the agreement on a durable medium accompanied by the information notice and has expressly consented subsequently to the use of the CESL.

The CESL is a second national law regime within the law of each Member State, which exists alongside the pre-existing rules of national contract law¹⁵⁴. The private international law indicates the applicable law and within the national law, the parties can choose between the national contract law and the CESL¹⁵⁵. Recital 25 CESL states that where the CISG would be applicable to the contract that the choice of the CESL by the parties implies an agreement by them to exclude the CISG from the contract, thus only being applicable to the contract the CESL¹⁵⁶, this will only be the case when the parties to the contract are both traders, since the CISG is not applicable to consumer contracts.

The OSD and DCD are addressed to Member States which have to transpose them by adopting national laws that comply with the Directives¹⁵⁷. The OSD and DCD are applicable to domestic transactions as well as to cross-border transactions when the conflict of law rules appoint the national law applicable. The OSD is only applicable to distance sales contracts whilst the DCD is applicable to distance contracts and to on-premises contracts.

2.4 Subject matter

The CISG governs the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from the contract. The CISG is not concerned with the validity of the contract or any of its provisions or of any usage as well as the effect which the contract may have on the property in the goods sold¹⁵⁸. It also does not apply to the

¹⁵¹ Annex II of the Regulation on CESL contains a Standard Information Notice.

¹⁵² Art. 9 (1) Regulation on CESL.

¹⁵³ The contract will be governed by the applicable national law which is applicable as a result of the Rome I Regulation.

¹⁵⁴ Recital 9 CESL.

¹⁵⁵ Recital 10 CESL.

¹⁵⁶ According to Ingeborg Schwenzer, in “CESL and CISG”, in Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM, 2013, www.juridicas.unam.mx, p. 334., it is doubtful whether such a disposition can be ordered by the European Authorities, as the question whether the parties validly opted out from the CISG is entirely to be decided autonomously under the CISG itself.

¹⁵⁷ Art. 20 OSD and art. 21 DCD.

¹⁵⁸ Art. 4 CISG.

liability of the seller for death or personal injury caused by the goods to any person¹⁵⁹, therefore product liability is excluded.

The CSD is concerned with certain aspects of the sale of consumer goods and associated guarantees¹⁶⁰, namely the conformity of goods, the rights of the consumer, the right of redress and commercial guarantees. It is up to national rules to provide for the aspects that are not governed by the CSD. This is in line with what is established in article 8 (1) CSD which foresees that the rights resulting from it are exercised without prejudice to other rights which the consumer may invoke under the national rules governing contractual or non-contractual liability.

The PSCL governs the conformity with the contract, delivery of the goods, the rights of the consumer, guarantee period, period for the exercise of rights, direct responsibility of the producer, right of redress and voluntary guarantees. The matters that are not foreseen in the PSCL are governed by the Portuguese Civil Code and by the Portuguese Consumer Protection Law.

The CESL contains provisions on pre-contractual duties, conclusion of a contract, right to withdraw in B2C contracts (distance and off-premises contracts), defects in consent, interpretation of contracts, contents and effects of the contract, unfair contract terms, obligations and remedies of both parties, passing of risk, damages and interest, restitution and prescription. The CESL does not cover legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, the transfer of ownership, intellectual property law and the law of torts as well as the issue whether concurrent contractual and non-contractual liability claims can be pursued together¹⁶¹, which are left to the applicable national law under the Rome I Regulation or Rome II Regulation. The CESL does not govern any matters outside the scope of contract law¹⁶², national law is applicable to such matters.

The OSD deals with certain requirements relating to distance sales contracts, like rules on conformity of goods, remedies in case of non-conformity and the modalities for the

¹⁵⁹ Art. 5 CISG.

¹⁶⁰ Art. 1 (1) CSD

¹⁶¹ Recital 27 CESL.

¹⁶² Recital 28 CESL.

exercise of these remedies and commercial guarantees¹⁶³. In matters not regulated by the OSD, it does not affect the national general contract rules such as rules on formation, the validity or effects of contracts, including the consequences of the termination of a contract¹⁶⁴, these matters are regulated by the applicable national laws.

The DCD deals with certain requirements concerning contracts for the supply of digital content to consumers, in particular rules on conformity of digital content with the contract, remedies in case of the lack of such conformity and the modalities for the exercise of those remedies as well as on modification and termination of such contracts¹⁶⁵. In matters not regulated in the DCD, it does not affect the national general contract laws such as rules on formation, the validity or effects of contracts, including the consequences of the termination of a contract¹⁶⁶. The DCD does not deal with copyright and other intellectual property related aspects of the supply of digital content¹⁶⁷. The DCD does not affect the protection of individuals regarding the processing of personal data¹⁶⁸. Recital 22 states that the protection of individuals regarding the processing of personal data is not governed by the DCD and that the legal instruments¹⁶⁹ in force regarding these matters are applicable and that the implementation and application of the DCD should be made in compliance with that legal framework. If any provision of the DCD conflicts with a provision of another EU act governing a specific sector or subject matter, the provision of that EU act has precedence over the DCD¹⁷⁰. The OSD and the DCD have provisions regarding public enforcement of the referred Directives¹⁷¹.

3. Conformity

¹⁶³ Art. 1 (1) OSD.

¹⁶⁴ Art. 1 (4) OSD.

¹⁶⁵ Art. 1 DCD.

¹⁶⁶ Art. 3 (9) DCD.

¹⁶⁷ Recital 21 DCD.

¹⁶⁸ Art. 3 (8) DCD.

¹⁶⁹ The General Data Protection Regulation entered into force on the 24 May 2016 and shall apply from the 25 May 2018.

¹⁷⁰ Art. 3 (7) DCD.

¹⁷¹ Art. 17 OSD and art. 18 DCD.

None of the legal instruments under analysis define what is considered “conformity to the contract”¹⁷². The conformity of the goods to the contract is assessed by comparing what is provided for (whether expressly or impliedly) and what is delivered¹⁷³. The lack of conformity is the difference between what is delivered and what should have been delivered.

3.1 Conformity with the Contract

The CISG, in article 35 provides the requirements to determine whether the goods delivered conform to the contract. Article 35 (1) CISG establishes that the seller must deliver goods which are of the “*quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract*”. Goods delivered by the seller have to conform to all the criteria stated in the contract in order to be in conformity. The quantity of the goods delivered by the seller must conform to what was foreseen in the contract. Any discrepancy in quantity, whether more or less, than the agreed quantity is considered as lack of conformity. The agreement of the parties regarding the quality of the goods has to also be met in order for the goods to conform to the contract¹⁷⁴. Quality refers to the physical condition of the goods as well as to the non-physical features of the goods such as factual and legal circumstances concerning the relationship of the goods to their surroundings¹⁷⁵.

The goods delivered must conform to the description given to them by the contract, therefore if the goods suffer any deviation from the contractual description, there is a lack of conformity of the goods. The delivery of different types of goods to those agreed upon (*aliud pro alio*) is considered a lack of conformity as there is an actual delivery of the goods but the goods do not conform to the description given to them by the contract. Another criterion in article 35 (1) is that the goods be contained and packaged in the manner required by the contract. This is important in international sales as the goods often have to undergo long distance transportation and the packaging protects the goods during

¹⁷² Carlos Ferreira de Almeida, Op. Cit., p. 159, states that conformity is a “deontic relation between two entities, the relation that is established between something as it is and something as it should be”.

¹⁷³ Jorge Morais Carvalho, Op. Cit., p. 246.

¹⁷⁴ The contractual quality may include the age of the goods, according to Kristian Maley, in op. cit., p. 14.

¹⁷⁵ Faton Shabani, in “Non-conformity of Goods in Light of the United Nations Convention on Contracts for the International Sale of Goods and the Law on Obligations of the Republic of Macedonia as Part of South-Eastern European Law”, p. 86. Kristian Maley, in Op. Cit., p. 13.

transportation. If the goods are not packaged according to that required by the contract, there is lack of conformity of the goods.

The CSD adopted the concept of conformity with the contract in article 2 (1) CSD which provides that “*the seller must deliver goods to the consumer which are in conformity with the contract*”. The PSCL has an exact same provision in article 2 (1). These two provisions are the same and we will analyse them together. These provisions, unlike article 35 (1) CISG, do not expressly refer to the quantity, quality and description required by the contract nor do they refer that the goods must be contained or packaged in the manner required by the contract. They are general clauses that state that the goods must conform with the contract and all its terms which includes what is foreseen in article 35 (1) CISG¹⁷⁶. The concept of lack of conformity of the goods to the contract includes defects in goods, lack of quality or delivery of a different quantity to that agreed upon. Regarding the delivery of different goods to that agreed upon, there is lack of conformity to the contract, as the goods were delivered, however the delivered goods do not conform to the contract as they were not the goods that the parties agreed upon, thus they are included in the concept in article 2 (1) CSD and article 2 (1) PSCL¹⁷⁷¹⁷⁸.

The CESL in article 91 lays down the main obligations of the seller of goods or the supplier of digital content, among others, is to ensure that the *goods or the digital content are in conformity with the contract*. Article 99 (1) CESL lays down the subjective requirements for the goods and digital content to conform to the contract in subparagraphs (a) to (c). Firstly, in order for the goods or digital content to conform to the contract, they must be of the quantity, quality and description required by the

¹⁷⁶ Dário Moura Vicente, Op. Cit., p.134, maintains that the CSD is based on the CISG. Luís Manuel Teles de Menezes Leitão, Op. Cit., p. 44, refers that the preparatory work of the CSD show that art. 35 CISG was the main inspiration of art. 2 (1) Directive. ¹⁷⁶ Carlos Ferreira de Almeida, Op. Cit., p. 160.

¹⁷⁷ Sara Larcher, Op. Cit., p. 180. Alexandre Mota Pinto, in “Venda de Bens de Consumo e Garantias – O Direito Vivido nos Tribunais”, p. 196.

¹⁷⁸ The Portuguese case law has in the majority of cases decided that the concept of lack of conformity also includes any lack of conformity between the goods delivered and that that was agreed upon. In the judgment by the Coimbra Appeals Court of 16-11-2010 (case no. 1998/08.6TB AVR.C1) in which it was agreed upon that the vehicle should have a number plate of June 2007, the month of the seller’s son’s birthday, a service vehicle was delivered with a number plate of April 2007. In the judgement of the Coimbra Appeals Court of 04-10-2005 (case no. 1461/05), it was agreed upon that the vehicle should have seats and upholsteries in leather, but the vehicle delivered had fake leather seats and upholsteries. There are some court decisions that consider the delivery of goods that are different from that agreed upon as non-performance of delivery and do not apply the PSCL. For example: judgement of the Portuguese Supreme Court of Justice of 09-10-2007 (case no. 07A2628) and the judgement of that same court of 19-02-2004 (case no. 03B309).

contract¹⁷⁹¹⁸⁰. The differences in quantity delivered can either be that the goods are delivered in a bigger quantity or in a smaller quantity than that agreed upon by the parties¹⁸¹. Secondly, the goods or digital content must be contained or packaged in the manner required by the contract, in order to conform to the contract¹⁸². Thirdly, in order to conform to the contract, the goods or digital content must be supplied along with the accessories, installation instructions or other instructions required by the contract¹⁸³. These criteria in sub-paragraphs (a) to (c) of article 99 (1) CESL are joined together by the word “and” which shows that for the goods to conform to the contract all three criteria must be met, should any one of them not be fulfilled the goods do not conform to the contract.

The OSD in article 4 (1) (a) to (c) establishes criteria in order for the goods to conform to the contract. This provision establishes that the seller shall ensure that, in order to conform to the contract, the goods shall “*where relevant*” and then lists the criteria, which indicates that the criteria are applicable depending on the specific characteristics of the goods, should one of those criteria not be applicable due to the goods’ characteristics the remaining criteria are. Moreover, the criteria are cumulative since the various sub-paragraphs of article 4 (1) are joined together by the word “and”, therefore, the goods to conform to the contract must meet all the criteria foreseen in that provision, except when it is not relevant. In order to conform to the contract, the goods shall be of the quantity, quality and description required by the contract, which includes that where the seller shows a sample or a model to the consumer, the goods shall possess the quality of and correspond to the description of this sample or model¹⁸⁴. The delivery of goods that are different from that agreed upon do not conform to the contract. The differences in quantity whether the delivery of more goods or less goods than that agreed upon in the contract are considered lack of conformity with the contract. The second criteria established in article 4 (1) (b) in order for the goods or digital content to conform to the contract, they shall “*be fit for any particular purpose for which the consumer requires them and which the consumer made known to the seller at the time of the conclusion of the contract and which the seller has accepted*”. In addition, the goods must possess the qualities and

¹⁷⁹ Art. 99 (1) (a) CESL.

¹⁸⁰ This part of the provision is the same as art. 35 (1) CISG.

¹⁸¹ The CESL regulates the delivery of wrong quantity in Section 3 “Taking Delivery”.

¹⁸² Art. 99 (1) (b) CESL.

¹⁸³ Art. 99 (1) (c) CESL.

¹⁸⁴ Art. 4 (1) (a) OSD.

performance capabilities indicated in any pre-contractual statement which forms an integral part of the contract¹⁸⁵. The pre-contractual statements made about the goods before the conclusion of the contract are part of the contract and have to be complied with. These statements are made to the consumer before the conclusion of the contract, which can be in leaflets, photographs that are shown, catalogues or in negotiations with the consumer.

The DCD lays down the criteria for the digital content to conform to the contract in article 6 (1). This provision establishes that “*in order to conform with the contract, the digital content shall, where relevant*” and then establishes in sub-paragraphs (a) to (d) the criteria for the conformity of the digital content to the contract. The sub-paragraphs are joined together by the word “and” which indicates that all the criteria need to be met in order for the goods to conform to the contract, if one of the criteria is not fulfilled then the goods are not in conformity. The provision states “*where relevant*” which means that the criteria have to all be met, unless the criteria taking into account the specific characteristics of the digital content is not applicable thereto, but the remaining criteria in the provision will have to be fulfilled.

The digital content to conform to the contract shall be of the quantity, quality, duration and version and shall possess the functionality, interoperability and other performance features such as accessibility, continuity and security, as required by the contract¹⁸⁶. Any pre-contractual information given also forms part of the contract¹⁸⁷. Secondly, in order for the digital content to conform to the contract they shall be fit for any particular purpose for which the consumer requires it and which the consumer made known to the supplier at the time of the conclusion of the contract and which the supplier accepted¹⁸⁸. In addition, in order to conform to the contract, the digital content shall be supplied along with instructions and customer assistance as stipulated by the contract and be updated as stipulated by the contract¹⁸⁹. The DCD provides that in order to conform to the contract the digital content must meet the subjective requirements in article 6 (1) and the requirements on integration of the digital content and be free of third party rights¹⁹⁰.

¹⁸⁵ Art. 4 (1) (c) OSD.

¹⁸⁶ It is common that the contract in these situations will be in the form of a digital document.

¹⁸⁷ Art. 6 (1) (a) DCD.

¹⁸⁸ Art. 6 (1) (b) DCD.

¹⁸⁹ Art. 6 (1) (c) and (d) DCD.

¹⁹⁰ Art. 6 (5) DCD.

3.2 Legal Criteria for Conformity

The legal instruments under analysis all establish legal criteria for conformity. Article 35 (2) (a) to (d) CISG contains the legal criteria to assess the conformity of the goods to the contract. If the parties have not excluded these criteria then they are bound by them. The question as to whether the parties agreed to contractual terms that excluded the seller's obligations under article 35 (2) is governed by the CISG's rules on interpretation¹⁹¹¹⁹². The criteria laid down in this provision are cumulative, the goods have to meet all the applicable criteria in sub-paragraphs (a) to (d) in order for the goods to conform to the contract¹⁹³. The seller's liability can be excluded or limited for the non-conformity of the goods, according to article 6 CISG. Some authors raise the question as to the fairness of limitation clauses and their validity¹⁹⁴.

The CSD provides criteria for establishing the conformity of the consumer goods to the contract in article 2 (2), which states "*consumer goods **are** presumed to be in conformity with the contract, if they...*" and then establishes the criteria in sub-paragraphs (a) to (d). Criteria found in article 2 (2) (a) and (b) are subjective and in (c) and (d) objective (not determined by the agreement of the parties but by other factors relating to the goods, like the goods of the same type or the consumer's expectations. The criteria in the presumption of the conformity of the goods to the contract laid down in article 2 (2) are applicable when there are no specific contractual terms regarding the characteristics or function of the goods or when the minimum protection clause is applied, in order to determine the lack of conformity of the goods to the contract¹⁹⁵. The criteria are set out in a positive manner and there is a rebuttable presumption¹⁹⁶ that the goods conform to the contract if they fulfil the criteria therein. The consumer can still prove that the goods do not conform to the contract, although the lack of conformity does not result from the criteria mentioned in that provision¹⁹⁷. This provision presumes the conformity of the goods to the contract

¹⁹¹ UNCITRAL – Digest of Case Law, Op. Cit., p. 141. Some Court decisions have applied domestic law to determine the validity of agreements to exclude the seller's obligations under article 35 (2). Judgement of 21 May 1996 by the Oberlandesgericht Köln, Germany (case No. 168).

¹⁹² Arts. 7 and 8 CISG.

¹⁹³ UNCITRAL – Digest of Case Law, Op. Cit., p. 141.

¹⁹⁴ Nan Kham Mai, "Non Conformity of Goods and Limitation Clause under CISG, UCC and UK Law", 2015, in in <http://dspace.lib.niigata-u.ac.jp>, p. 233 and 234, refers that the validity of limitation clauses depends on domestic law as issues on validity of the contract or any of its provisions are excluded from the CISG according to art. 4 (a) CISG.

¹⁹⁵ Recital 8 CSD states that the presumption does not restrict the principle of freedom of contract.

¹⁹⁶ Recital 8 CSD.

¹⁹⁷ Jorge Morais Carvalho, Op. Cit., p. 247.

if all the requirements laid down in article 2 (2) are met¹⁹⁸. Thus, if goods do not fulfil any one of the criteria mentioned in the provision then there is a lack of conformity of the goods with the contract. However, if the goods at stake render a particular requirement inappropriate, the requirement does not need to be fulfilled but the remaining requirements of the presumption do in order for the goods to conform to the contract¹⁹⁹. The parties can agree on the goods having certain characteristics and thus the goods delivered to the consumer have to have those characteristics, should they not have the characteristics agreed upon, the goods do not conform to the contract, according to article 2 (1). When the parties agree that a criteria established in article 2 (2) is not applicable, article 7 (1) should be taken into account that stipulates that any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller's attention which directly or indirectly waive or restrict the rights resulting from the CSD shall not be binding. Therefore, if the parties agree that a certain criteria in article 2 (2) is not applicable then the contractual clause has to be specific as to what criteria is not applicable taking into account the specific characteristics of the goods, thus it cannot be drafted in a general manner.

The PSCL contains in article 2 (2) the legal criteria for the conformity of the goods, which provides that the consumer goods are “*presumed not to be in conformity with the contract*” if any one of the criteria mentioned in sub-paragraphs a) to d) are fulfilled. These criteria are applicable when the parties do not lay down the specific requirements of the goods in the contract or when they do not contemplate the situations that are in the legal criteria²⁰⁰. Criteria (a) and (b) of the provision are subjective criteria and (c) and (d) objective. This provision is drafted differently to the CSD, the PSCL contains a “presumption” which considers there to be lack of conformity of the goods to the contract if the goods do not fulfil any one of the criteria listed. Seeing that article 2 (2) is drafted in a negative manner it is not a real presumption, since if there is a lack of conformity because one of the criteria therein is fulfilled it is not possible to prove the conformity of goods when there is already a lack of conformity²⁰¹. The lack of conformity of the goods

¹⁹⁸ Recital 8 CSD clearly states that “the elements mentioned in the presumption are cumulative”.

¹⁹⁹ Recital 8 CSD.

²⁰⁰ Jorge Morais Carvalho, Op. Cit., p. 247, refers that these rules are intended to specify what is in the contract, and afterwards at the moment of performance, to assess if the goods provided correspond to the goods that were contracted.

²⁰¹ Jorge Morais Carvalho, Op. Cit., p. 247, considers that article 2 (2) PSCL should be interpreted as not establishing a presumption. Luís Manuel Teles de Menezes Leitão, Op. Cit., p. 45, maintains that the drafting of art. 2 (2) PSCL is questionable as it is not understandable how a situation can be presumed as a

may result from one of the criteria mentioned in sub-paragraphs of article 2 (2) or from any other fact that the consumer is able to prove as being agreed upon by the parties and as being part of the contract²⁰². The criteria specifically agreed upon by the parties prevail over the criteria established in article 2 (2), however the parties cannot in general terms agree that any or all of the criteria in article 2 (2) are not applicable since according to article 10 (1) PSCL the agreement or contractual clause which before the lack of conformity is brought to the seller's attention, which waives or restricts the consumer's rights provided for in the PSCL is void²⁰³. Therefore, the contractual clause that establishes that a particular criteria is inapplicable has to be drafted in a specific manner taking into account the specific characteristics of the goods. If the circumstances of the goods render any criteria established in sub-paragraphs (a) to (d) of article 2 (2) inappropriate then it is not applicable but the remaining criteria will be applicable²⁰⁴.

The CESL drafts the legal criteria for conformity of the goods and digital content in article 100, as follows “*the goods or digital content must*” and then lists the criteria in sub-paragraphs (a) to (g), criteria in (a), (c) and (f) are subjective and the remaining are objective. This provision does not refer to a presumption but uses a stronger word “must” which implies an obligation. Furthermore, article 99 (2) states that in order to conform with the contract the goods or digital content must meet the criteria laid down in the contract in article 99 (1) as well as the requirements in article 100, the correct installation requirements and be free from third party rights or claims, unless the parties agree otherwise. Sub-paragraphs a) to g) of article 100 CESL are joined by the word “and” which indicates that all the criteria have to be met in order for the goods or digital content to be in conformity, should one of the criteria not be fulfilled the goods or digital content are not in conformity. Article 108 CESL stipulates that in a B2C contract, the parties may not, to the detriment of the consumer, exclude the application of the seller's obligations chapter, or derogate from or vary its effects before the lack of conformity is brought to the trader's attention by the consumer.

result of a negative fact, when the burden of proof is up to the seller that he delivered the goods in conformity with the contract.

²⁰² Jorge Morais Carvalho, Op. Cit., p. 247.

²⁰³ Jorge Morais Carvalho, Op. Cit., p. 248, explains that the exclusion of the objective criteria established in art. 2 by the parties has to be analysed according to art. 10 (1) of the law. In the author's opinion, although the parties may adapt the contract's content, they are limited therein.

²⁰⁴ Luís Manuel Teles de Menezes Leitão, Op. Cit., p. 46.

Article 5 OSD establishes the legal requirements for conformity of the goods which are objective. This provision states that “*the goods shall, where relevant*” and lists the requirements in sub-paragraphs a) to c). This provision provides that the “*goods shall*” which indicates that the goods have to meet the requirements for conformity of goods mentioned in its sub-paragraphs in order to conform to the contract. The sub-paragraphs are drafted cumulatively as there is an “and” between the sub-paragraphs, therefore in order for the goods to be in conformity they must fulfil all the requirements foreseen in the sub-paragraphs. The provision refers to “*where relevant*”, thus if the characteristics of the goods render a certain requirement inappropriate then that requirement does not need to be fulfilled, but the remaining requirements do. According to article 4 (2) OSD, in order for the goods to conform to the contract the subjective requirements in article 4 (1) as well as the requirements in article 5, the correct installation requirement and free from third party rights requirement have to all to be met²⁰⁵²⁰⁶.

The DCD establishes the legal requirements in article 6 (2), in the event that the contract does not stipulate, where relevant, in a clear and comprehensive manner, the requirements for the digital content under paragraph 1 (subjective requirements in the contract)²⁰⁷. This provision contains objective requirements. Article 6 (2) is only applicable when the contract does not stipulate the requirements for the digital content or it is unclear in that regard. Article 6 (2) stipulates “*where relevant*” which means that if the characteristics of the digital content render a certain requirement inappropriate then that requirement does not need to be fulfilled but the remaining requirements do. Article 6 (2) DCD establishes that the digital content shall be fit for the purposes for which digital content of the same description would normally be used, taking into account the elements listed in sub-paragraphs (a) to (c) that are joined together by the word “and”, which indicates that all of those elements have to be fulfilled in order for the digital content to be in conformity. In order for the digital content to conform to the contract it must meet the subjective requirements when the contract stipulates or when the contract does not

²⁰⁵ Recital 19 OSD states that the assessment of the conformity with the contract should take into account the requirements set out in the contract as well as the objective requirements which constitute the standards normally expected for goods.

²⁰⁶ Esther Arroyo Amayuelas, La Propuesta de Directiva relativa a determinados aspectos de los contratos de compraventa en línea y otras ventas de bienes a distancia”, in [Indret: Revista para el Análisis del Derecho](#), No. 3, 2016,, p. 8, refers that the fact that both the subjective and objective criteria have to be used cumulatively to assess the conformity this prevents that the contract falls in the hands of the seller exclusively, which was what would occur if the objective criteria would only be applicable when nothing was agreed upon.

²⁰⁷ Recital 25 DCD.

stipulate therein (art. 6 (1)) or it is unclear the requirements in article 6 as well as the integration of the digital content requirement and be free from third party rights requirement²⁰⁸

3.2.1 Compliance with the description given by the seller

The CISG does not establish as a criterion for conformity the description given by the seller before the conclusion of the contract and that is not provided for in the contract. Whether these statements are to be applicable depends on the interpretation of the statements made by the seller, according to article 8 CISG but it can also be considered misrepresentation and in that case it is not governed by the CISG

The CSD provides in article 2 (2) (a) that the goods are presumed to conform to the contract if they comply with the description given by the seller. The PSCL provides in article 2 (2) (a) that the consumer goods are presumed not to be in conformity to the contract if they do not comply with the description given by the seller. Only the seller's description is at stake here and not that of third parties²⁰⁹. The description given by the seller can be any statement made by the seller regarding the goods, namely, the description of the goods in catalogues or in posters²¹⁰. The description given by the seller must be precise and objective regarding the characteristics of the goods²¹¹. Some authors argue that vague and subjective descriptions of the goods given by the seller should be used as a criterion in order to determine what type of goods regarding quality should be provided, in order to avoid that the seller says general or vague things about the goods in order to sell them and then he is not bound by them²¹². The description can be given in a pre-contractual phase or at the time of the conclusion of the contract and it is not in the contract²¹³. The description given by the seller is binding on him, therefore the goods

²⁰⁸ Art. 6 (5) DCD.

²⁰⁹ Third party statements are included in article 2 (2) (d) CSD.

²¹⁰ Sara Larcher, Op. Cit., p. 186. Luís Manuel Teles de Menezes Leitão, Op. Cit., p. 47.

²¹¹ Article 7 (5) Portuguese Consumer Protection Law considers that all concrete and objective information in advertising messages of certain goods, services or rights are considered included in the contents of the contracts which are concluded after the advertisement and the contract clauses to the contrary are considered not written.

²¹² Jorge Morais de Carvalho, Op. Cit., p. 249, gives the example when the seller declares that “the cake is the best chocolate cake in the world”, that it cannot contain poor quality chocolate.

²¹³ Sara Larcher, Op. Cit., p. 186. Jorge Morais Carvalho, Op. Cit., p. 248.

have to comply with that description in order to comply to the contract²¹⁴²¹⁵. The parties cannot include in the contract a general clause that excludes the compliance with the descriptions given by the seller and if they do it is not binding on the consumer, according to article 7 (1) CSD and article 10 (1) PSCL.

The CESL establishes in article 100 (1) (f) that the goods or digital content must possess the qualities and performance capabilities indicated in any pre-contractual statements which forms part of the contractual terms by virtue of article 69. When the trader or someone that is engaged in advertising or marketing for the trader makes a statement to the other party or publicly, about the characteristics of what is to be supplied by that trader under the contract, the statement is incorporated as a term of the contract²¹⁶. However, if the other party was aware or could be expected to be aware when the contract was concluded that the statement was incorrect or could not otherwise be relied on as such a term or when the other party's decision to conclude the contract could not have been influenced by the statement then it is not incorporated as a term of the contract²¹⁷.

Article 4 (1) (c) OSD stipulates that the goods, in order to conform to the contract shall possess the qualities and performance capabilities indicated in any pre-contractual statement which forms an integral part of the contract.

Article 6 (1) (a) DCD establishes that in order to conform to the contract, the digital content shall be of quantity, quality, duration and version and possess functionality, interoperability and other performance features such as accessibility, continuity and security as required by any pre-contractual information which forms part of the contract.

3.2.2 Possess the quality of goods which the seller held out as a sample or model

According to article 35 (2) (b) CISG, the goods do not conform with the contract unless they possess the qualities of goods which the seller has held out to the buyer as a sample²¹⁸

²¹⁴ In the judgements by the Coimbra Appeals Court of 18-01-2011 (case no. 2129/03.4TBVIS-C1) and by Oporto Appeals Court of 15-09-2011 (case no. 7679/08.3TBMTS.P1) art. 2 (2) (a) PSCL was applied to situations in which the goods did not comply with the description made by the seller or did not have the qualities held out by the seller, in the situation of second-hand vehicles and with defects, that the seller assured that they were "like new".

²¹⁵ Jorge Morais de Carvalho, Op. Cit., p. 248.

²¹⁶ Art. 69 (1) and (2) CESL.

²¹⁷ Art. 69 (1) (a) and (b) CESL.

²¹⁸ A sample is defined as "a representative part or a single item from a larger whole or group especially when presented for inspection or shown as evidence of quality: [specimen](https://www.merriam-webster.com/dictionary/sample)", in the Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/sample>.

or model²¹⁹. It is debatable whether the mere holding out of the sample or model suffices or if an express agreement between the parties is necessary. There are different positions among the authors and court cases, some refer that the goods must conform to a sample or model if there is an express agreement in the contract that the goods will do so. Others argue that there is no need for an implied agreement as the mere holding out of the model or sample suffices as by submitting the sample or model the seller specifies his offer²²⁰. If the parties agree that the goods will not have the exact qualities of the goods that the seller showed to the buyer as a sample or model then this criteria does not apply. Some authors maintain that article 35 (2) (c) CISG is applicable when the buyer provides the model, as long as the parties agreed that the goods should conform to the model²²¹. Other authors consider that in this case it falls under article 35 (1) CISG²²².

The CSD provides in the final part of article 2 (2) (a) that the consumer goods are presumed to conform with the contract if they possess the qualities of the goods which the seller has held out to the consumer as a sample or model. Similarly, the PSCL establishes in article 2 (2) (a) that consumer goods are presumed not to be in conformity with the contract if they do not possess the qualities of the goods which the seller has held out to the consumer as a sample or model. The goods sold must be the same as the sample or model. When photographs of the goods are shown to the consumer, the goods sold must be the same as the goods in the photographs²²³. If the parties agree and include in the contract a general clause that establishes that the sample or model is irrelevant or that the goods do not comply in general with the sample or model, this clause is not valid, according to article 10 PSCL and article 7 CSD²²⁴. If the seller explains to the consumer that the goods are not exactly the same as the sample or the model and specifies the exact differences between them then that clause is part of the contract and is acceptable²²⁵.

²¹⁹ A model is defined as “a usually miniature representation of something or a pattern of something to be made”, in the Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/model>.

²²⁰ Villy de Luca, “The Conformity of the Goods to the Contract in International Sales”, in *Pace International Law Review*, Vol. 27, 1, Art. 4, 2015, p 218.

²²¹ UNCITRAL – Digest of Case Law, Op. Cit., p. 143. Judgement of Rechtbank van Koophandel, Belgium, 14 Sept. 2005.

²²² Nan Kham Mai, Op. Cit., p 231. Villy de Luca, Op. Cit., p 220.

²²³ Sara Larcher, Op. Cit., p. 188 believes that a photograph of goods on a computer screen can be considered a sample or model for the purposes of article 2 (2) (a). Jorge Morais Carvalho, Op. Cit., p. 251.

²²⁴ Jorge Morais Carvalho, Op. Cit., p. 251 and 252.

²²⁵ Jorge Morais de Carvalho, Op. Cit., p. 252, gives the example of a sales contract of a vehicle in which the seller shows the consumer a vehicle of the same make and model which is the object of the contract, but indicates that the air conditioner is optional and that the colour can be chosen from various options. If the consumer chooses a vehicle without air conditioner, the vehicle does not have the same characteristics as that of the sample, but the seller’s behaviour is admissible.

Article 2 (2) (a) CSD raises the question whether the goods to conform with the contract have to comply with the description given by the seller as well as possess the qualities of the goods which the seller has held out to the consumer as a sample or model or if they only need to comply with one of the criteria provided for in this provision, i.e., the goods only need to comply with the description given by the seller or possess the qualities of the sample or model. Some authors maintain that the goods only need to comply with either the description given by the buyer or possess the qualities of the sample or model. Article 2 (2) (a) establishes that the goods must comply with the description given by the seller and possess the qualities of the sample or model. This provision has the word “and” which indicates that the criteria are cumulative and recital 8 states that the elements mentioned in the presumption in article 2 (2) are cumulative²²⁶. The PSCL establishes in article 2 (2) (a) that the goods are presumed not to be in conformity with the contract if they do not comply with the description given by the seller or do not possess the qualities of the goods which the seller has held out to the consumer as a sample²²⁷ or model, thus if one of the criteria in the provision is not complied with, the goods are presumed not to conform with the contract.

Article 100 (c) CESL establishes that the goods or digital content must possess the qualities of goods or digital content which the seller held out to the buyer as a sample or model. The OSD provides in article 4 (1) (a) that the seller shall ensure that, in order to conform with the contract, that when the seller shows a sample or model to the consumer, the goods possess the quality of and correspond to the description of the sample or model the seller showed the consumer. The DCD does not have a provision with this requirement.

3.2.3 Fitness for particular purpose

Article 35 (2) (b) CISG provides that the goods do not conform with the contract unless they are fit for any particular purpose expressly or impliedly made known to the seller at

²²⁶ Sara Larcher, *Op. Cit.*, p. 188, states that from the consumer protection’s point of view the accumulation of the criteria is preferable and that goods conform to the contract if they comply with the description given by the seller and possess the qualities of the sample or model. Thus if the goods only possess the qualities of the sample and do not comply with the description given by the seller, there is a lack of conformity of the goods with the contract.

²²⁷ The Judgement by the Lisbon Court of Appeal of 24-04-2012 (case no. 2861/06.0TMSNT.L1-7), considered as a sale by sample, a contract in which the seller showed the buyers in his factory samples of marble tiles of a certain type, the buyer agreed to buy the necessary amount for the living room and hall floors. The court decided that there is a lack of conformity with the contract when out of the 212 agreed tiles, only 68 were according to the samples shown, the other 144 were of different types.

the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely or that it was unreasonable for him to rely on the seller's skill and judgement. The particular purpose has to be expressly or impliedly made known to the seller. When the particular purpose is expressly made known to the seller and is a contractual term then article 35 (1) is applicable²²⁸. Article 35 (2) is applicable when the particular purpose is not a contractual term, notwithstanding the buyer expressed the intention to use the goods for a particular purpose to the seller²²⁹. The particular purpose is impliedly made known to the seller when in light of the circumstances, the seller should have understood the use the buyer intended to make of the goods²³⁰. The particular purpose may arise from circumstances surrounding the contract, like the negotiations²³¹. The seller has to expressly or impliedly agree²³² to the particular purpose and the seller has to comply with that particular purpose.

This provision has an exception by which the seller is not liable when he does not deliver goods fit for a particular purpose although the particular purpose for which the goods were purchased was expressly or impliedly made known to him at the time of the conclusion of the contract, when "*the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely on the seller's skill and judgement*". The question of whether there is reliance must be interpreted on a case-by-case basis. Some court decisions and authors refer that there will be reliance if the buyer is a "specialist or expert in the manufacture or procurement of goods for the particular purpose"²³³ or if there is a "technical gap between the parties"²³⁴. This provision presumes that the buyer will rely on the seller, except when reliance is unjustifiable²³⁵. The Secretariat's Commentary on article 35 gives an example of a situation that could fall within this exception, when the circumstances show that the buyer selected the goods by brand name or that he described

²²⁸Kristian Maley, Op. Cit., p 20.

²²⁹ Villy de Luca, Op. Cit., p 212.

²³⁰ Villy de Luca, Op. Cit., p 213.

²³¹ Kristian Maley, Op. Cit., p. 20, considers that it is irrelevant that the seller had actual knowledge of the particular purpose and therefore the test is objective in the sense that the buyer must have been put in a position to be able to judge the purpose.

²³² The seller's silence is regarded as an agreement to the particular purpose the buyer requires the goods of which he informed him.

²³³ Judgement by the High Court of New Zealand, 30 July 2010 (Case no. CIV-2009-409-000363), held that a buyer did not reasonably rely on the seller's skill and judgement where the buyer was an experienced importer of goods.

²³⁴ Kristian Maley, Ob. Cit., p. 21. Judgement by the Landgericht Coburg, Germany, 12 Dec. 2006 (case no. 22 O 38/06) , , decided that a buyer is not deemed to have relied on the seller's skill and judgement where the buyer possessed skills and knowledge of the goods equal or greater than that of the seller.

²³⁵ Kristian Maley, Ob. Cit., p. 21.

the goods using highly technical specifications, then it could be held that the buyer had not relied on the seller's skill and judgement. The referred Commentary mentions that if the seller knew that the goods ordered by the buyer would not be satisfactory for the particular purpose for which they were ordered, he would have to disclose this fact to the buyer and if even so the buyer went ahead and purchased the goods it would be clear that he did not rely on the seller's skill and judgement. It also states that it would be unreasonable for the buyer to rely on the seller's skill and judgement if the seller did not purport to have any special knowledge in respect to the goods in question²³⁶.

Under article 2 (2) (b) CSD, consumer goods are presumed to be in conformity with the contract if they are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller accepted. The PSCL provides in article 2 (2) (b) that the consumer goods are presumed not to be in conformity with the contract if they are not fit for any particular use for which the consumer requires them and which he made known to the seller at the time of the conclusion of the contract and which the seller accepted. The CSD and the PSCL do not state that the consumer makes known to the seller the particular purpose expressly or impliedly, thus the consumer needs to communicate to the seller in a clear manner the particular purpose for which he needs the goods at the time of the conclusion of the contract. They expressly stipulate that the seller must accept the particular purpose, thus the seller must explicitly or implicitly (when the seller does not disagree with the particular purpose of the goods) agree to that particular purpose^{237/238}. This agreement is part of the contract, although it is not a contractual term,

²³⁶ Article 35: Secretariat Commentary (Closest Counterpart to an Official Commentary) in <http://iicl.law.pace.edu/cisg/page/article-35-secretariat-commentary-closest-counterpart-official-commentary>. Fritz Enderlein, in Sarcevic & Volken, *The Vienna Sales Convention: History and Perspective*, Oceana, 1986, p. 157, refers that "if the buyer uses the goods himself in his factory, he may be better informed than a seller who is a trader and not a producer".

²³⁷ Jorge Morais Carvalho, *Op. Cit.*, p. 256. Luís Menezes Leitão, *Op. Cit.*, p.48. Sonja A. Kruisinga, in "The Impact of Uniform Law on National Law: Limits and Possibilities – CISG and its influence in Dutch Law" in the *Electronic Journal of Comparative Law*, Vol. 13.2, May 2009, <http://www.ejcl.org>, p. 11, refers that it is not necessary that the seller accepts the particular purpose before or at the time when the contract was concluded and adds that a later one-sided acceptance should suffice.

²³⁸ In a Judgement by the Guimarães Court of Appeal of 10-10-2013 (case no. 73529/10.0YIPRT.G1), in which the seller showed the consumer various models and the consumer chose the one that was sold to him. The consumer informed the seller that the goods were to be used by a person on a wheelchair. It was not proved that the consumer informed the seller that the goods were to be used by someone with highly significant disabilities. The court considered that the burden of proof of the use by a highly significant disabled person was on the consumer. As it was not proven that the consumer informed the seller that the goods would be used by someone with highly significant disabilities, the court considered that the goods conformed to the contract and were fit for the purpose for which they were required, to be used by someone in a wheelchair.

therefore the goods must comply with the particular purpose agreed upon²³⁹. The seller can refuse that the goods have the particular purpose that the consumer requires them for and then it is not binding on the seller and the goods do not have to comply with the particular purpose the consumer requires them for. Unlike the CISG, the CSD and the PSCL do not establish an exception to this requirement when circumstances show that the buyer did not rely or that it was unreasonable for him to rely on the seller's skill and judgement, thus they are more protective of the consumer.

Article 100 (a) CESL provides that the goods or digital content must be fit for any particular purpose made known to the seller at the time of the conclusion of the contract, except where circumstances show that the buyer did not rely, or that it was unreasonable for the buyer to rely on the seller's skill and judgement. This provision foresees an exception, like the CISG, in the case that the buyer did not rely or that it was unreasonable to rely on the seller's skill and judgement. The CESL does not refer to the seller's agreement on the particular purpose made known to him at the time of the conclusion of the contract, despite this the seller must agree either explicitly or implicitly in order for the particular purpose to be binding on him.

Article 4 (1) (b) OSD establishes that the seller shall ensure that, in order to conform with the contract, the goods are fit for any particular purpose for which the consumer requires them and which the consumer made known to the seller at the time of the conclusion of the contract and which the seller has accepted. The seller is only liable for the lack of conformity of the goods if he expressly or impliedly²⁴⁰ accepted the particular purpose for which the consumer requires the goods and that was made known to the seller at the time of the conclusion of the contract. If the seller rejects the particular purpose he is not liable if the goods do not conform to the particular purpose the consumer requires them for. The OSD does not provide that the seller is not liable when circumstances show that the consumer did not rely or that it was unreasonable for the him to rely, on the seller's

²³⁹ Luís Manuel Teles de Menezes Leitão, *Op. Cit.*, p. 48, argues that the particular purpose for which the consumer requires the goods does not need to be included as a contractual term nor does it have to be incidentally provided for in the contract. The author states that article 2 (2) (b) only requires that the purpose of the goods is informed by the consumer to the seller and that the seller did not oppose to that purpose at the time of conclusion of the contract. Twigg-Flesner/Robert Bradgate, *Op. Cit.*, the criteria to be used should be the consumer's trust. If a consumer wants to use an appliance for a certain purpose and informs the seller thereof who does not give any reply or he answers that he has never used it for that purpose, but thinks that the appliance can be used for that purpose, although the seller did not expressly accept the purpose, but the fact that he did not reject the purpose seems sufficient for it to be part of the guarantee.

²⁴⁰ The seller's silence is regarded as acceptance of the particular purpose.

skill and judgment, therefore the seller will be liable when the consumer makes known to him that the goods must be fit for a particular purpose at the time of the conclusion of the contract and he accepts it, it does not matter whether or not the consumer relied or if it was unreasonable for him to rely on the seller's skill and judgement. Similarly, article 6 (1) (b) DCD provides that in order to conform with the contract, the digital content shall be fit for any particular purpose for which the consumer requires it and which the consumer made known to the supplier at the time of the conclusion of the contract and which the supplier accepted.

3.2.4 Fitness for normal uses

Under article 35 (2) (a) CISG, goods do not conform to the contract unless they are fit for the purposes for which goods of the same description would ordinarily be used²⁴¹. The seller must deliver goods that are fit for all the purposes for which goods of the same description are ordinarily used, if the goods are only fit for some of the ordinary purposes, the goods are not in conformity²⁴². If a particular purpose for which the goods are to be used is made known to the seller by the buyer then the requirement of the ordinary purpose is not applicable. Courts and authors have different interpretations of “*ordinarily be used*” and set a variety of standards like the goods being of “merchantable quality”, “average quality”, “reasonable quality”²⁴³ and being resalable. In order to assess whether the goods are in conformity to the contract, the normal expectations of persons buying the goods with that particular description should be taken into account. The requirement must be determined on a case by case basis, by interpreting the requirement taking into account the type of goods and all the surrounding circumstances involved. As the goods

²⁴¹ In the Frozen Pork Case (Judgement by the German Federal Supreme Court of 2 March 2005), the Court held that two of the three deliveries of pork meat were non-conforming according to article 35 (2) (a) CISG as the suspicion of contamination thereof affected the resale of the pork meat which was considered to be the “ordinarily use” in trade. The Court held that it was not necessary to ascertain that the meat was really contaminated by dioxin, the suspicion was sufficient for the meat to be unsellable and non-conforming.

²⁴² Faton Shabani, in “Non-conformity of Goods in Light of the United Nations Convention on Contracts for the International Sale of Goods and the Law on Obligations of the Republic of Macedonia as Part of South-Eastern European Law”, in Academic Journal of Interdisciplinary Studies, Vol. 4, No. 2 S1, MCSER Publishing, Rome, Aug. 2015, states that “the term “ordinary use” the practice suggests that the goods must be usable under such circumstances as are typical for that kind of goods”.

²⁴³ In the judgement of the Condensate Crude Oil Mix Case by the Netherlands Arbitration Institute 15 Oct. 2002 (Case no. 2319), the buyer alleged the lack of conformity in oil condensate referred to as “Rijn Blend” due to high level of mercury and referred that the levels of mercury made the Rijn Blend unacceptable for further processing and sales. It was decided that art. 35 (2) (a) should be interpreted according to the reasonable quality criteria and held that the Rijn Blend did not meet the reasonable quality criteria because the price the parties agreed upon would not be paid for condensate with increased levels of mercury and no quality issues had occurred in the previous contracts between the parties thus the party could expect a constant quality level of Rijn Blend.

ordinary use includes resale, they will be considered unfit should they have defects that reduce their trade value or they become unsellable, despite being fit for other ordinary uses²⁴⁴. A question that is raised is whether article 35 (2) (a) refers to the description of the goods that prevails at the seller's place of business²⁴⁵ or at the place where the buyer intends to use the goods²⁴⁶. Another question raised regarding article 35 (2) (a) is whether the seller has to comply with the public law requirements of the seller's country or the public law requirements of the buyer's country. When the parties agree that the goods must comply with public law requirements of the seller's or the buyer's country, the agreement is binding on both parties according to article 35 (2) "except where the parties have agreed otherwise". The question only arises if there is no agreement between the parties as to which public law requirements should the goods comply with, whether the seller's country's public law requirements or the buyer's country's public law requirements. In the New Zealand Mussels Case²⁴⁷, the Court held that the public law regulations of the country of the seller's place of business prevail and govern the conformity of the goods to the contract according to article 35 (2) CISG as enterprises (especially smaller enterprises) do not know the regulations for the use of goods in the intended country and the buyer cannot trust that the seller has knowledge of the public law requirements. Nevertheless, the Court stated three exemptions to this rule when the public law standards of the buyer's country will prevail. Firstly, when the public laws of the buyer's country correspond to those in the seller's country. Secondly, when the buyer informed the seller about the regulations in his country. Lastly, when the seller knew or should have known about the regulations due to special circumstances, e.g. the seller has a branch in the buyer's country, he has delivered goods for some time to that country and therefore should have knowledge of the buyer's country's public law regulations regarding those goods²⁴⁸.

²⁴⁴ Article 35: Secretariat Commentary [Op. Cit.](#)

²⁴⁵ C.M. Bianca, in Bianca-Bonell Commentary, Guiffré, Milan, 1987 p. 274.

²⁴⁶ Peter Schlechtriem, in "The Seller's Obligations Under the United Nations Convention on Contracts for the International Sale of Goods International Sales", in Gaston & Smit, International Sales, Matthew Bender, 1984, p. 21.

²⁴⁷ Judgement by the German Supreme Court of 8 March 1995 (Case no. VIII ZR 159/94).

²⁴⁸ Peter Schlechtriem, in Editorial Remarks on New Zealand's Mussels Case, in <http://cisgw3.law.pace.edu/cases/950308g3.html>, maintains that when the parties have not agreed upon which public law regulations the goods should conform with, that the solution should be developed from art. 35 (2) (b) CISG. The author refers that what is decisive is the particular purpose of the goods, whether the goods are to be used or resold in the importing country or whether they are to be further exported to a third country. If the seller knows where the goods are intended to be used then he will be expected to have taken the factors that influence the possibility of their use in that country into consideration. The author

The CSD establishes in article 2 (2) (c) that consumer goods are presumed to be in conformity with the contract if they are fit for the purposes for which goods of the same type are normally used. The PSCL provides that goods are presumed not to be in conformity to the contract if they are not fit for the purposes for which goods of the same type are normally used²⁴⁹. The criteria to assess what are the normal uses of goods is objective. The CSD and the PSCL refer to the “*purposes for which goods of the same type are normally used*” in the plural, therefore the goods have to be fit for all the purposes for which goods of the same type are normally used and not just for some of them. The parties cannot agree that the goods are not fit for any or all of the normal uses, this clause is invalid according to article 7 (1) CSD and article 10 (1) PSCL. Nevertheless, the parties may specifically agree that the goods have particular characteristics and thus the normal uses will be of goods with those particular characteristics and not the normal uses of goods of the same type in general²⁵⁰.

Article 100 (b) CESL provides that the goods or the digital content must be fit for the purposes for which goods or digital content of the same description would ordinarily be used²⁵¹. This criteria has the same wording as that found in the CISG, with the difference that it is also applicable to digital content. The OSD provides in article 5 (a) that the goods shall be fit for all the purposes for which goods of the same description would ordinarily be used. This provision is the same as that found in the CISG and CESL, just that it expressly states that the goods must be fit for “*all*” purposes for which goods of the same description are ordinarily used.

gives the example of export of foodstuffs with pork or beef to countries which, due to religious reasons, the resale of pork or beef violates legal or religious laws, the seller cannot claim that in his country other rules or customs prevail. The author considers that smaller enterprises that export goods cannot know all the regulations and considers that the exceptions found in art. 35 (2) CISG should help smaller companies if the buyer did not rely or if it was unreasonable for him to rely on his supplier's skill and judgement regarding the regulations that influence the use of the goods in the intended country.

²⁴⁹ Art. 2 (2) (c) PSCL.

²⁵⁰ Jorge Morais de Carvalho, Op. Cit., p. 254 and 255, gives the example of a 1920 television that a consumer purchases from a professional, the consumer cannot expect that the television works and to use it for its normal use, this television may be used as decoration or as a collector's item.

²⁵¹ Marco B.M. Loos and Chantal MAK, in “Remedies for buyers in case of Contracts for the Supply of Digital Content”, in Policy Department C: Citizen's Rights and Constitutional Affairs, European Parliament, European Union, 2012, p. 11 and 12, argue that this criterion seems more difficult to apply to digital content than to goods. The authors state that an important difference between goods and digital content is that the quality of goods can usually be assessed before the sales contract is concluded, whereas the quality of digital content often only becomes apparent upon use. The authors note that the consumers expectations are to a large extent influenced by statements made by the industry which other than clarifying the features of the digital content, it enables the industry to manipulate consumer expectations and in that way set the standard for conformity of digital content.

The DCD stipulates in article 6 (2) that the digital content shall be fit for the purposes for which digital content of the same description would normally be used including its functionality, interoperability²⁵² and other performance features such as accessibility, continuity and security²⁵³. In order to assess such fitness for purpose, the DCD requires additional elements to be taken into account that are foreseen in paragraphs (a) to (c) of article 6 (2). Firstly, whether the digital content is supplied in exchange for a price or other counter-performance than money²⁵⁴, namely data. It seems that consumers who pay for the supply of digital content can expect more than those who merely provide their data²⁵⁵. Secondly, where relevant, any existing international technical standards²⁵⁶ or, in the absence of such technical standards, applicable industry codes of conduct and good practices²⁵⁷. This requirement is only applicable “where relevant” which indicates that if the elements therein do not exist or are not applicable to the digital content in question, then this element does not need to be fulfilled but the others do. And, lastly, any public statements made by or on behalf of the supplier or other persons in earlier links of the chain of transactions. The public statements can be made by the supplier or someone else on his behalf or by persons in the earlier links of the chain. However, these public statements are not to be taken into account in three circumstances, firstly when the supplier shows that he was not, and could not reasonably have been, aware of the statement in question; or by the time of conclusion of the contract the statement had been

²⁵² Recital 26 DCD establishes that “due to its nature digital content needs to interact with other digital equipment to function properly; interoperability should therefore form a part of the conformity criteria. In particular it needs to interact with hardware including processor speed and graphics card features and software including a specific version of the operating system or specific multi-media player. The notion of functionality should refer to the ways in which digital content can be used; it should also refer to the absence or presence of any technical restrictions such as protection via Digital Rights Management or regional coding”.

²⁵³ The performance features of “accessibility, continuity and security” are found in the criterion in art. 6 (1) (a) thus when the contract foresees them or in pre-contractual information but they are also found when the contract does not stipulate the requirements for the conformity of the digital content (art. 6 (2) DCD).

²⁵⁴ Art. 6 (2) (a) DCD.

²⁵⁵ Rafal Manko, *Op. Cit.*, p. 16 states that “it seems that the rationale of article 6 (2) is that consumers who pay money can expect a higher level of performance, whereas those who merely give away their data instead of paying should have lower expectations about quality”. Vanessa Mak does not agree with this solution and states that consumers often value their privacy more than money, and that the protection granted to consumers paying with their data should “never fall below the protection that consumers can normally expect”, in Rafal Manko, *Op. Cit.*, p. 16.

²⁵⁶ Recital 28 DCD states that “when applying the rules of this Directive, suppliers should make use of standards, open technical specifications, good practices and codes of conduct, including in relation to the commonly used data format for retrieving the content generated by the user or any other content provided by the consumer, whether established at the international level, the European level or at the level of a specific industry sector. In this context, the Commission may consider the promotion of the development of international and European standards and the drawing up of a code of conduct by trade associations and other representative organisations that could support the uniform implementation of the Directive”.

²⁵⁷ Art. 6 (2) (b) DCD.

corrected; or, lastly, the decision to acquire the digital content could not have been influenced by the statement²⁵⁸. It is up to the supplier to prove that any one of these circumstances occurred. The requirements laid down in article 6 (2) (a) to (c) all need to be met in order for the digital content to be in conformity as they are joined by the word “and”, except when the characteristics of the goods make that requirement not relevant, in addition the requirement in (b) emphasises that it is only applicable where relevant.

3.2.5 Contained and packaged in the Usual Manner

The CISG establishes that the goods do not conform to the contract unless they are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods^{259/260}. This provision also provides for situations when new types of goods are sold and there is no usual manner of packaging them, in those cases the goods must be contained or packaged in an adequate manner in order to preserve and protect them. Improper packaged goods do not conform to the contract under article 35 (2) (d). The prevailing view is that the packaging standards that prevail in the seller’s country are those that need to be met if the parties do not stipulate in the contract the packaging requirements²⁶¹.

The CSD and the PSCL do not foresee this criteria. Like the CISG, the CESL establishes in article 100 (d) that the goods or digital content must be contained or packaged in the manner usual for such goods or where there is no such manner, in a manner adequate to preserve and protect the goods. Article 5 (b) OSD provides that the goods shall be delivered along with packaging as the consumer may expect to receive. The consumer’s expectations as to the packaging of the goods depending on the type of goods. The DCD does not have a provision that contains this requirement.

3.2.6 Conformity with the quality and performance which the consumer can reasonably expect taking into account public statements

The CISG does not have a provision with this criteria for conformity of the goods to the contract regarding the buyer’s reasonable expectations as to the quality and performance

²⁵⁸ Art. 6 (2) (c) (i) to (iii) DCD.

²⁵⁹ Art. 35 (2) (d) CISG.

²⁶⁰ The Secretariat’s Commentary on article 35 explains that “this provision which sets forth a minimum standard, is not intended to discourage the seller from packaging the goods in a manner that will give them better protection from damage than would the usual manner of packaging”.

²⁶¹ UNCITRAL – Digest of Case Law, Op. Cit., p. 143.

which are normal in goods of the same type taking into account the public statements made by the seller or the producer or his representative on the specific characteristics of the goods.

The CSD stipulates in article 2 (2) (d) that goods are presumed to be in conformity to the contract if they show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling. Likewise, the PSCL establishes that goods are presumed not to be in conformity to the contract if they do not show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, namely in advertising or on labelling²⁶².

These provisions contain two elements. The first element refers to the fact that the goods must show the quality and performance which are normal in goods of the same type. The other element found in these provisions is the reasonable expectations of the consumer, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative. One of the questions that this criterion raises is whether these elements are cumulative (only if both are not complied with the lack of conformity is presumed) or if the elements are alternative, if one of the elements is not complied with the goods are presumed not to be in conformity with the contract²⁶³. The presumption of lack of conformity will take place when both of the elements are not complied with because article 2 (2) (b) has an “and” which joins the two elements which shows that for the goods to be presumed not to be in conformity with the contract they must not comply with all the elements in the criterion in this provision.

This provision does not regard the normal use of the goods, but the actual qualities and characteristics of the goods. The goods must have the normal performance during a period

²⁶² Art. 2 (2) (d) PSCL.

²⁶³ Judgement by the Lisbon Court of Appeals of 23/06/2009, the Court refers that the two elements are cumulative taking into account Recital 8 CSD which states that they are cumulative as well as the fact that the provision in (d) of article 2 (2) PSCL uses the word “and”.

of time that is suitable for goods of the same type²⁶⁴, if the goods stop working after a short period of time that is not normal in goods of the same type which usually work for a longer period of time and it is not due to the consumer, there is a lack of conformity of the goods. The consumer's reasonable expectations are interpreted objectively, the assessment of the qualities and the performance of the goods is made taking into account what is normal and reasonably possible as well as taking into account a normal, average consumer that has little knowledge of the goods. The actual consumer's expectations are not relevant, goods must conform to what any person can reasonably expect^{265/266}. In order to assess the qualities and performance that the consumer can reasonably expect, the nature of the goods²⁶⁷ should be taken into account. The qualities and performance that the consumer can reasonably expect from the goods may be different depending on the actual goods and their characteristics. Therefore if the goods are of a certain type one cannot expect them to have the qualities and performance of goods of another type²⁶⁸. Recital 8 CSD foresees that the quality and performance that consumers can reasonably expect will depend inter alia on whether the goods are new or second-hand. If goods are bought second-hand and have already been used the consumer cannot expect the goods to have the same qualities and performance as the same goods that are new²⁶⁹.

In the assessment of the qualities and performance that the consumer can reasonably expect, the public statements on the specific characteristics of the goods made by the seller, producer or his representative should be taken into account, particularly in advertising or information on labels. Article 7 (5) Portuguese Consumer Protection Law

²⁶⁴ Jorge Morais de Carvalho, *Op. Cit.*, p. 257.

²⁶⁵ Jorge Morais de Carvalho, *Op. Cit.*, p. 258.

²⁶⁶ According to the judgement by the Lisbon Court of Appeal of 06-12-2011, a vehicle is presumed not to be in conformity with the contract (due to the fact that it does not show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect) if the vehicle was a new middle of the range/top of the line vehicle and the buyer is confronted more or less frequently, with the regeneration of the particle filter, with the need to follow a certain procedure foreseen in the manual, which entails driving the vehicle for a certain period of time at a minimum speed and certain rotation, sometimes, repeatedly in a short period of time and even when the regeneration was made at the garage of the seller and it was confirmed that it was successfully made and that there was no system malfunction.

²⁶⁷ João Calvão da Silva, *Op. Cit.*, p. 89, states that regarding the nature of the goods, the age, the goods being new or old, little or very used, as well as the differences in prices for which goods of the same type are offered should be taken into account.

²⁶⁸ If a consumer buys a certain model of a car, he cannot expect the car to have the same qualities and performance of a car of a superior model with specific characteristics and qualities.

²⁶⁹ If a consumer buys a second-hand car, he cannot expect the car to have the same equipment that the latest model of the car has nor can he expect the car's spare parts to last as long as a brand new car since they have already been used. The car should have the performance and quality that a consumer can reasonably expect of a car with the age and use (kilometres) that cars of the same type with the same age have.

establishes that” “*the specific and objective information in advertising of certain, goods, service or right is considered part of the contents of the contracts that are concluded after its issue, the contractual clauses to the contrary are considered not written*”. The objective and specific information that is contained in advertising about certain goods is considered part of the contract, therefore abstract, vague and subjective statements are not included²⁷⁰. The public statements have to state “*quality and performance which are normal in goods of the same type*”, thus are possible in that type of goods²⁷¹. The consumer’s reasonable expectations are also taken into account in the interpretation of the statement which is that of a normal average consumer and how he would interpret the statement²⁷². The seller is bound by the public statements made by him, the producer or his representative, as long as the statement is prior to the conclusion of the contract and led to its conclusion, according to article 2 (2) (d) CSD and PSCL, as long as the statements are specific and objective information about the characteristics of the goods.

The CSD establishes in article 2 (4) that the seller shall not be bound by public statements made by the producer or his representative in three cases. Firstly, if the seller shows that he was not, and could not reasonably have been, aware of the statement in question; secondly if he shows that by the time of the conclusion of the contract the statement had been corrected; or lastly if he shows that the decision to buy the goods could not have been influenced by the statement. The seller has to prove that any one of these circumstances occurred in order not to be bound by the public statements. The PSCL has no provision in this regard and this raises the question when advertising or labelling is made by a producer or his representative in what way the seller that is unaware of the statement is bound by the public statement²⁷³. For the PSCL, it is irrelevant if the seller is aware or unaware of the producer’s or his representative’s statement, the seller is bound by the public statements made by third parties. If the PSCL intended for the seller not to be bound by these statements, it would have included a provision stating that when it transposed the CSD seeing that the CSD has a provision in article 2 (4) in that sense.

²⁷⁰ Sara Larcher, Ob. Cit., p. 193. Jorge Morais de Carvalho, Op. Cit., p. 263.

²⁷¹ Jorge Morais de Carvalho, Op. Cit., p. 264.

²⁷² Jorge Morais de Carvalho, Op. Cit., p. 264, gives an example of an advertisement of a drink which refers to it as the best in the world which does not create in the consumer the belief that all the drinks’ qualities were compared, despite this, higher quality raw materials should be used to make the drink.

²⁷³ Luís Manuel Teles de Menezes Leitão, Op. Cit., p. 52 and 53, is of the opinion that according to article 2 (2) (d) PSCL the seller is bound by public statements of third parties, in which he is not part, thus the seller has strict liability in this case.

Thus, the PSCL gives a higher level of protection to the consumer than that found in the CSD²⁷⁴.

Article 100 (g) CESL states that the goods or digital content must possess such qualities and performance capabilities as the buyer may expect. The qualities and performance capabilities of the goods or digital content must be those that the buyer may expect, no reference is made to reasonable expectations. The buyer's expectations as to the qualities and performance capabilities normal in goods of the same type as well as the nature of the goods are also not referred. This provision is vague leaving questions regarding how to assess the buyer's expectations whether it should be done objectively or subjectively taking into account the actual buyer's expectations. This provision also states that when determining what the consumer may expect of the digital content regard is to be had to whether or not the digital content was supplied in exchange for the payment of a price. It seems that a lower standard is set for digital content which is gratuitous than for paid digital content. Thus, when a buyer can use digital content for free he may not expect it to be of the same quality as when the digital content is paid for.

Article 100 (f) CESL stipulates that the goods or digital content must possess the qualities and performance capabilities indicated in any pre-contractual statement which forms part of the contract terms according to article 69. When the trader or a person engaged in advertising or marketing for the trader makes a statement before the contract is concluded, publicly, about the characteristics of what is to be supplied by that trader under the contract, the statement is incorporated as a term of the contract²⁷⁵. When the other party is a consumer a public statement made by or on behalf of a producer or any other person in earlier links of the chain of transactions leading to the contract is regarded as being made by the trader and thus is part of the contract²⁷⁶. In B2B sales, public statements made by or on behalf of the producer or any other person in earlier links of the chain of transactions that lead to the contract are not binding on the seller. The CESL does not specifically refer to labelling which raises the question as to whether it is also applicable to information on labels. The labelling made by a producer is a public statement and it is

²⁷⁴ Art. 8 (2) CSD provides that Member States may adopt more stringent provisions to ensure a higher level of consumer protection.

²⁷⁵ Art. 69 (1) and (2) CESL.

²⁷⁶ Art. 69 (3) CESL.

on the goods before the contract is concluded therefore it should also be applicable thereto.

Article 69 CESL foresees situations in which the statements made are not to be incorporated as a term of the contract. In B2C relations, public statements made by or on behalf of a producer or other person in earlier links of the chain of transactions that leads to the contract are not incorporated as a contractual term when at the time of conclusion of the contract, the trader did not know and could not be expected to have known of it²⁷⁷. In B2B and in B2C relations a public statement made by the trader or person engaged in advertising or marketing for the trader before the contract is concluded, about the characteristics of what is to be supplied by the trader is not incorporated as a term of the contract if the other party was aware, or could be expected to have been aware when the contract was concluded that the statement was incorrect²⁷⁸ or could not otherwise be relied on as such a term²⁷⁹; or when the other party's decision to conclude the contract could not have been influenced by the statement²⁸⁰. In B2C relations the parties may not, to the detriment of the consumer, exclude the application of article 69 nor derogate from or vary its effects²⁸¹. However, in B2B relations the parties may exclude, derogate or change the effects of article 69 and thus the statements made by the trader or by a person engaged in advertising or marketing for the trader before the conclusion of the contract is not incorporated as a term of the contract if the parties so agree.

The OSD provides that the goods shall possess qualities and performance capabilities which are normal in goods of the same type and which the consumer may expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller or other persons in earlier links of the chain of transactions, including the producer²⁸². This provision is similar to that found in the CSD and the PSCL. The difference is that this provision refers to “*any public statement made by or on behalf of the seller or other persons in earlier links of the chain of transactions, including the producer*”, whilst the CSD and PSCL refer to “*any public statements made by the seller, the producer or his representative...*”. The OSD seems to have a broader scope, it

²⁷⁷ Art. 69 (3) CESL.

²⁷⁸ The party was aware that the statement was incorrect either because it had been corrected or the trader or another person had informed him or he had knowledge that it was incorrect.

²⁷⁹ The statement is impossible or vague.

²⁸⁰ Arts. 69 (1) (a) and (b) CESL

²⁸¹ Art. 69 (4) CESL.

²⁸² Art. 5 (c) OSD.

expressly admits public statements made by other persons in earlier links of transactions other than the producer²⁸³, however the interpretation made of the CSD and the PSCD should also include public statements made by any third party to the contract regarding the characteristics of the goods. The OSD provides that any public statement made by or on behalf of the seller or other persons in earlier links of the chain of transactions including the producer, are not to be taken into account in three situations. Firstly when the seller shows that he was not, and could not reasonably have been aware of the statement in question. Secondly, if the seller shows that by the time of conclusion of the contract the statement had been corrected, or, lastly, if the seller shows that the decision to buy the goods could not have been influenced by the statement²⁸⁴. The seller has to prove that any one of these situations occurred so that he is not bound by them.

The DCD does not contain a provision concerning the consumer's legitimate expectations concerning the qualities and performance capabilities of the digital content along the lines of the other legal instruments under analysis. Article 6 (2) (c) DCD takes into account any public statement made by or on behalf of the supplier or other persons in earlier links of the chain of transactions, as one of the elements to be taken into account in the requirement that the goods be fit for the purposes for which digital content of the same description would normally be used including its functionality, interoperability and other performance features such as accessibility, continuity and security. The DCD provides that the public statements made by or on behalf of the supplier or other persons in earlier links of the chain of transactions are not taken into account in three situations. Firstly, when the supplier shows that he was not and could not reasonably have been, aware of the statement in question; secondly, he shows that by the time of conclusion of the contract the statement had been corrected; or, thirdly, he shows that the decision to acquire the digital content could not have been influenced by the statement. The supplier has to prove that any one of these situations in order not to be bound by them.

²⁸³ Christoph Busch, Hans Schulte-Nolke, Aneta Wiewiorowska-Domagalska and Fryderyk Zoll, in "The Rise of the Platform Economy: A New Challenge for EU Consumer Law?" in *Journal of European Consumer and Market Law*, EuCML 1/2016 – Vol. 5, Feb. 2016, pg. 6, refer that the OSD has a more comprehensive approach to that found in the CSD. The authors are of the opinion that the expression "earlier links of the chain of transaction" does not precisely cover the situation when the statements have been made by the operator of a platform (regarding online platforms) who only facilitates the conclusion of the contract between the seller and the consumer. The authors state that the wording of article 2 (2) (c) OSD should be extended to cover also "persons facilitating the conclusion of the contract between the seller and the consumer".

²⁸⁴ Art. 5 (c) (i) to (iii) CESL.

3.2.7 Digital Content Be Updated

The DCD establishes that unless the parties agree otherwise, digital content shall be supplied in conformity with the most recent version of the digital content which was available at the time of the conclusion of the contract²⁸⁵. The parties can agree that the digital content supplied is not the most recent version of the digital content available at the time of the conclusion of the contract. If there is no agreement, then the digital content supplied has to be in conformity with the most recent version of the digital content available at the time of the conclusion of the contract, otherwise there is lack of conformity of the digital content. Article 6 (3) DCD provides that when the contract stipulates that the digital content shall be supplied over a period of time that the digital content shall be in conformity with the contract throughout the duration of that period²⁸⁶. Digital content is constantly undergoing changes and there are new and updated versions thereof, therefore in order for the digital content to conform to the contract throughout its existence it has to be updated. The DCD does not establish how the update should be made when there is no contractual clause stipulating the update²⁸⁷. The seller is liable in contracts in which the digital content is to be supplied over a period of time, for any lack of conformity which occurs during the duration of that period.

Article 103 CESL provides that the digital content is not considered as not conforming to the contract when an updated digital content has become available after the conclusion of the contract. Thus, the digital content has to be in conformity at the time of the conclusion of the contract, any updates that occur to it after that, does not render the digital content non-conforming. Article 105 (4) CESL provides that when the digital content must be subsequently updated by the trader, the trader must ensure that the digital content remains in conformity with the contract throughout the duration of the contract. This provision is applicable when there is a contractual term that states that the digital content must be updated or it is implicit that the contract is over a period of time and considering the type of digital content supplied it must be updated²⁸⁸. This provision is applicable, for instance,

²⁸⁵ Art. 6 (4) DCD.

²⁸⁶ Recital 29 DCD refers that “many types of digital content are supplied over a period of time. For instance, consumers access cloud services over a period of time. It is therefore important to ensure that the digital content is in conformity with the contract throughout the duration of the contract”.

²⁸⁷ One of the subjective requirements is that the digital content must be “*updated as stipulated by the contract*” in which the update must be made according to what is stipulated in the contract (art. 6 (d) OSD)

²⁸⁸ Norbert Reich, in “An Optional Sales Law Instrument for European Businesses and Consumers?” in Study for the Austrian “Ministerium für Konsumentenangelegenheiten”, Vienna, 2011., p. 70, argues that

for online subscriptions to e-newspapers or e-magazines that need to be updated. However, in other situations when the buyer received the digital content and it was the most recent version at the time of the conclusion of the contract and later there are updates and the buyer experiences problems, article 105 (4) is not applicable²⁸⁹. The DCD has gone further than the CESL as it includes a general provision that expressly stipulates that in contracts where the digital content shall be supplied over a period of time, the digital content shall be in conformity throughout the duration of the period and thus being applicable to all digital content contracts that do not consist in a one time performance.

3.2.8 Delivered along with accessories, installation instructions or other instructions

The CESL in article 100 (e) provides that the goods and digital must be supplied along with “*such accessories, installation instructions or other instructions as the buyer may expect to receive*”²⁹⁰. The accessories, installation instructions and other instructions to be supplied with the goods or digital content depend on what the buyer expects to receive depending on the type of goods or digital content. The CESL does not define what are accessories or installation instructions or other instructions.

Similarly, the OSD establishes in article 5 (b) that the goods shall be delivered along with such accessories including packaging, installation instructions or other instructions as the consumer may expect to receive. The accessories, installation instructions and any other instructions to be delivered with the goods depends on the consumers expectations depending on the type of goods. There is no definition of accessories and packaging.

The DCD provides in article 6 (1) (c) as one of the subjective requirements, that in order for the digital content to conform with the contract, the digital content shall be supplied along with any instructions and customer service assistance as stipulated by the contract. It is up to the contract to stipulate what instructions or customer service assistance the digital content should be supplied with. The DCD does not foresee this a legal criterion, thus if the contract does not establish the instructions and customer assistance to be supplied then there is no obligation on the supplier to supply them.

Neither the CISG, the CSD nor the PSCL contain this criterion

the right to an update depends on its (express or implied) terms and “thereby may simply be avoided by avoiding such a clause in the contract”:

²⁸⁹ Marco B.M. Loos and Chantal MAK, Ob. Cit., p. 24.

²⁹⁰ Art. 100 (c) CESL.

3.2.9 Conformity of the installation and installation instructions

The CISG does not have a provision regarding the conformity of the installation and the installation instructions of the goods. Despite this, the CISG Commentaries consider that the seller is liable for all shortcomings of the installation manual and that the goods are considered not to be fit for the ordinary purpose in such a case.

The CSD provides in article 2 (5) two situations in which the incorrect installation of consumer goods is regarded as lack of conformity. The PSCL has an exact same provision with the same wording in article 2 (4) to that in the CSD and also foresees both situations mentioned above. Therefore we will analyse the two legal instruments together. The first situation regards any lack of conformity resulting from incorrect installation of the consumer goods is deemed equivalent to lack of conformity of the goods if the installation forms part of the contract of sale of the goods and the goods were installed by the seller or under his responsibility. Therefore, the installation of the goods has to be in conformity to the contract. The contracts are mixed-purpose contracts of sale of goods and of provision of installation services of the goods. The performance conforms to the contract when both obligations resulting from both contracts are complied with in conformity to the contract. Secondly, it is considered as a lack of conformity of the goods if the product, intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions²⁹¹. The installation can be made by the consumer or by a third party. According to Jorge Morais Carvalho²⁹² the criteria to define the conformity of the instructions should be of an average consumer of those goods, without any special knowledge regarding installation of goods. The author maintains that if the instructions are technically correct, but are complex to the extent that a normal consumer will not understand them, then they should not be considered in conformity with the contract.

The CESL has a provision regarding the incorrect installation of goods or digital content but only under consumer sales contract, it is not applicable to B2B contracts. Article 101 (1) CESL establishes that when goods or digital content supplied under a consumer sales contract are incorrectly installed, any lack of conformity resulting from the incorrect installation is regarded as lack of conformity of the goods or the digital content if, on the

²⁹¹ This clause was known during the discussions as the “IKEA clause”.

²⁹² Jorge Morais Carvalho, *Op. Cit.*, p. 272.

one hand, the goods or the digital content were installed by the seller or under the his responsibility or, on the other hand, if the goods or the digital content were intended to be installed by the consumer and the incorrect installation was due to a shortcoming²⁹³ in the installation instructions. The only difference between the CESL's provision to that in the CSD and the PSCL is that the latter expressly stipulate that the installation forms part of the contract of sale of the goods, whilst the CESL does not refer to the installation being part of the contract. Under the CESL, the installation is considered a related service to goods or digital content which is provided by the seller of the goods or the supplier of the digital content under the sales contract or a separate related contract which was concluded at the same time as the sales contract or the contract for the supply of digital content, according to article 2 (m) CESL. The parties may not, to the detriment of the consumer, exclude the application of the article 101 CESL or derogate from or vary its effects²⁹⁴. The CESL in article 148 (4) establishes that in a B2C contract which the related service includes the installation of goods, the installation must be such that the installed goods conform to the contract as required by article 101. This provision is not applicable to B2B contracts.

The OSD foresees that when the goods are incorrectly installed, any lack of conformity resulting from the incorrect installation is regarded as lack of conformity to the contract in two situations, firstly, if the goods were installed by the seller or under his responsibility or if the goods, intended to be installed by the consumer, were installed by the consumer and the incorrect installation was due to a shortcoming in the installation instructions²⁹⁵. This provision is exactly the same to that found in the CESL. The OSD stipulates that the parties to the contract may exclude, derogate from or vary the effects of the requirements foreseen in the provision regarding the incorrect installation, to the detriment of the consumer, if at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods and the consumer expressly accepted this specific condition when concluding the contract, under articles 4 (3) and 18 OSD. Thus, the consumer has to know of the specific condition of the goods at the time of the conclusion of the contract and he has to expressly accept that condition when he concludes the contract.

²⁹³ Norbert Reich, *Op. Cit.*, p. 68, is of the opinion that "shortcomings" of instructions refers not only to technical defects but also to their "lack of comprehensibility".

²⁹⁴ Art. 101 (2) CESL.

²⁹⁵ Art. 6 OSD.

The DCD has a provision regarding the integration of the digital content. Article 7 DCD establishes that when the digital content is incorrectly integrated into the consumer's digital environment, any lack of conformity resulting from the incorrect integration shall be regarded as lack of conformity of the digital content if the digital content was integrated by the supplier or under his responsibility, or if the digital content was intended to be integrated by the consumer and the incorrect integration was due to shortcomings in the integration instructions when those instructions were supplied as stipulated by the contract or, in the absence of such stipulation in the contract, the instructions should have been supplied in accordance with any existing international technical standards or, in the absence of such technical standards, according to the applicable industry codes of conduct and good practices. The DCD refers to the integration of the digital content into the consumer's digital environment, whereas the CESL refers to the installation of the digital content, they both refer to the same process but the DCD uses a more appropriate technical term when referring to digital content. According to article 6 (5) in order for the digital content to conform with the contract it must meet the correct integration requirement as well as the requirements in the contract or should the contract not stipulate these or if they are unclear, the criteria in article 6 (2) DCD as well as be free from third party rights. Article 19 states the mandatory nature of this requirement as the exclusion, derogation from or variation of its effects by contractual term before the lack of conformity with the contract is brought to the supplier's attention by the consumer is not binding on the consumer.

3.2.10 Third party rights

The CISG has two provisions regarding third party rights, one is found in article 41 which deals with third party rights and claims, whilst article 42 concerns third party rights or claims based on industrial property or other intellectual property. The aim of these provisions is to ensure that the buyer has unconditional use of the goods he purchased without interference by another party claiming rights over the goods. According to article 41 CISG the seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. This provision protects the buyer not only when the third party rights are established but also

when they are merely claimed by the third party²⁹⁶. The legal nature of the claim is irrelevant, it can be a third party claim based on property rights²⁹⁷ or any other right, other than third party rights or claims based on industrial property or other intellectual property governed by article 42. The buyer's use of the goods is infringed or disrupted by the third party claims.

According to article 42 (1), the seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property²⁹⁸, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the claim is based on industrial property or other intellectual property under the law of the State²⁹⁹ where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or when not contemplated³⁰⁰ by the parties, under the law of the State where the buyer has his place of business. In order for article 42 CISG to be applicable it suffices that an intellectual property right exists as it is a limitation to the buyer reselling the goods and therefore the seller is liable in those cases despite the third party not claiming his intellectual property rights³⁰¹. Article 42 (1) is applicable to an unfounded claim by a third party as it is difficult for the buyer to know whether the claim is unfounded³⁰².

The CSD and the PSCL do not have a provision that provides that the goods must be delivered free from any third party rights as well as free from third party rights based on industrial property or other intellectual property³⁰³. The CSD is only applicable to material

²⁹⁶ Ingeborg Schwenzer and David Tebel, in "Suspensions, mere suspicions: non-conformity of the goods?", *Unif. L. Rev.*, Vol.19, Oxford University Press, Oxford, 2014, in <http://ulr.oxfordjournals.org>, p. 155, argues that the buyer is also protected if suspicions hinder the resale or any other intended use for the goods.

²⁹⁷ The transfer of property and its effects is outside the scope of the CISG and is left to the applicable national law, under art. 4 (1) CISG.

²⁹⁸ Art. 2 (viii) Convention of the World Intellectual Property Organization of 14 July 1967 (WIPO) defines intellectual property as all the rights which owe their existence to any activity of the human mind in the fields of industry, science, literature and art.

²⁹⁹ The fact that "State" is in the singular and not in the plural raises the question as to whether only one country can be contemplated or more.

³⁰⁰ The word contemplate is vague. It is not necessary for the parties to include a term in the contract with the country. The parties must come to an agreement over the country which can be an oral agreement.

³⁰¹ Christian Rauda and Guillaume Efier, "Warranty for Intellectual Property Rights in the International Sale of Goods", in *Vindobona Journal of International Commercial Law and Arbitration*, Issue 1 (2000), p 5.

³⁰² Christian Rauda and Guillaume Efier, *Op. Cit.*, p 7.

³⁰³ Differently, Luís Manuel Teles de Menezes Leitão, *Op. Cit.*, p. 44 and 45, believes that the sale of goods that are not free from third party rights do not conform to the contract according to the CSD and the PSCL. The author argues that repair is an adequate remedy to free the goods from third party rights.

lack of conformity and not to third party rights or claims, although the goods should be delivered free from third party rights. Thus, regarding third party rights the national laws of the Member States are applicable^{304/305}.

According to article 102 (1) CESL, the goods must be free from and the digital content must be cleared of any right or not obviously unfounded claim of a third party. This provision is applicable to goods as well as to digital content. It states that the claim of a third party must not obviously be unfounded. The word “obviously” qualifies “unfounded” claim of a third party, thus when a third party makes a claim and it is clear that it is unfounded then it is not considered. If there is doubt as to whether it is unfounded it is no longer “obvious” therefore it should be considered as a claim by a third party. The CESL provides for rights and claims based on intellectual property in article 102 (2), by stating that the goods must be free from and the digital content must be cleared of any right or not obviously unfounded claim of a third party that under the law of the state where the goods or digital content will be used according to the contract or, in the absence of an agreement, under the law of the state of the buyer’s place of business or in B2C contracts the consumer’s place of residence indicated by the consumer at the time of the conclusion of the contract, and which the seller knew of or could be expected to have known of at the time of the conclusion of the contract. The CESL only mentions rights and claims based on intellectual property and does not mention industrial property but it is considered it encompasses industrial property. In B2C contracts, the parties may not, to the detriment of the consumer, exclude the application of article 102 regarding third party rights or claims or derogate from or vary its effects.

Article 7 OSD lays down that at the relevant time for establishing the conformity with the contract³⁰⁶, the goods must be free from any right of a third party, including based on intellectual property, so that the goods can be used in accordance with the contract³⁰⁷. The OSD states when the goods must be free from any right of a third party, at the relevant

³⁰⁴ The PSCL does not contain a provision regarding freedom from third party rights or claims of the goods, articles 905 et seq. Portuguese Civil Code are applicable to sales of consumer goods when the goods are delivered and third parties have claims, seeing that there are no provisions regarding this matter in the PSCL or in the Consumer Protection Law.

³⁰⁵ João Calvão da Silva, Op. Cit. p. 80.

³⁰⁶ According to art. 8 OSD.

³⁰⁷ Recital 21 OSD establishes that “conformity should cover material defects as well as legal defects. Third party rights and other legal defects might effectively bar the consumer from enjoying the goods in accordance with the contract when the right’s holder rightfully compels the consumer to stop infringing those rights. Therefore the seller should ensure that the goods are free from any right of a third party, which precludes the consumer from enjoying the goods in accordance with the contract”.

time for establishing conformity. The OSD refers to rights of a third party and not to claims nor does it state that the goods must be free from any right or “*not obviously unfounded claim of a third party*”. In the OSD, the right of the third party must be founded³⁰⁸. Moreover, Recital 21 OSD refers that the consumer can be barred from enjoying the goods in accordance with the contract when the third party right’s holder “*rightfully compels the consumer to stop infringing those rights*”. The OSD does not refer to industrial property but intellectual property encompasses industrial property. There is no reference regarding under which laws the right based on intellectual property should be claimed, therefore it seems that the goods must be free from any right based on intellectual property under any law. The goods in order to conform to the contract they must be in conformity with the requirements in article 4 (1), the requirements in article 5, the correct installation requirement and be free from third party rights³⁰⁹. According to article 18 OSD any contractual agreement which, to the detriment of the consumer, excludes the application of national measures that transpose the OSD, derogates from it or varies its effect before the lack of conformity with the contract of the goods is brought to the seller’s attention by the consumer, is not binding on the consumer. This provision does not allow the consumer to agree that the provision on third party rights is not applicable and that the goods have third party rights.

Article 8 DCD establishes that at the time the digital content is supplied to the consumer, the digital content must be free of any right of a third party, including based on intellectual property, so that the digital content can be used in accordance with the contract³¹⁰. The DCD provides when the digital content supplied to the consumer must be free from any right of a third party at the time the digital content is supplied to the consumer. The digital content must be free from third party rights based on intellectual property, no reference is made to industrial property but it is considered applicable thereto. Like the OSD, there is no reference as to the requirement under which law the third party rights based on

³⁰⁸ Esther Arroyo Amayuelas, Op. Cit., p. 11, considers that it means that the mere threat of exercising any right or claim is not enough, that only the ones that are reasonably founded.

³⁰⁹ Art. 4 (2) OSD.

³¹⁰ Recital 31 DCD states that “conformity should cover material as well as legal defects. Third party rights might effectively bar the consumer from enjoying the digital content or some of its features in accordance with the contract if those third party rights are infringed, and if when the third party rightfully compels the supplier to stop infringing those rights and to discontinue offering the digital content in question. Legal defects are particularly important for digital content, which, by its nature, is subject to intellectual property rights. Therefore the supplier should be obliged to ensure that the digital content is free from any right of a third party, for example a copyright claim related to the digital content, which precludes the consumer from enjoying the digital content in accordance with the contract”.

intellectual property must be free from thus it seems it must be free from all third party rights based on intellectual property irrespective of under which law. The DCD only refers to third party rights and not to claims, therefore the rights of the third parties must be somehow founded. Article 8 (2) DCD provides that when the digital content is supplied over a period of time, the supplier must, for the duration of that period, keep the digital content supplied to the consumer free of any right of a third party, including based on intellectual property, so that the digital content can be used in accordance with the contract. The digital content in order to conform with the contract must be free of third party rights as well as meet the requirements in article 6 (1) or should the contract not stipulate that requirement the requirement in article 6 (2))³¹¹. Article 19 DCD lays down that any contractual term which, to the detriment of the consumer, excludes the application of national measures that transpose the DCD, derogates from them or varies their effects before the lack of conformity with the contract is brought to the supplier's attention by the consumer, shall not be binding on the consumer. As a consequence, if in the contract the parties agree that the third party rights provision is not applicable and that the digital content has third party rights, it is considered not binding on the consumer.

3.2.11 Obligation to achieve result and obligation of care and skill

The CESL has special provisions regarding the obligations and remedies of the parties to a related service contract in Part V. The service provider must achieve any specific result required by the contract³¹². Should there not be any express or implied contractual obligation to achieve a specific result, the service provider must perform the related service with the care and skill which a reasonable service provider would exercise and in conformity with any statutory or other binding legal rules which are applicable to the related service, according to article 148 (2) CESL. Article 148 (3) CESL provides criteria to determine the reasonable care and skill required of the service provider. These are not closed criteria as the referred provision states that “among other things” before listing the criteria. The provision foresees three criteria. Firstly, in determining the reasonable care and skill regard is to be had to the nature, the magnitude, the frequency and the foreseeability of the risks involved in the performance of the related service for the customer³¹³. Secondly, regard should be had if damage has occurred, the costs of any

³¹¹ Art. 6 (5) DCD.

³¹² Art. 148 CESL.

³¹³ Art. 148 (3) (a) CESL.

precautions which would have prevented that damage or similar damage from occurring³¹⁴. Lastly, regard should be had to the time available for the performance of the related service³¹⁵. These three criteria are joined together by the word “and” which indicates that all three criteria have to be met if they are applicable. According to article 148 (5) CESL, in B2C relations the parties may not to the detriment of the consumer, exclude the application of paragraph 2 of article 148 or derogate from or vary its effects. This is only applicable to B2C relations; in B2B relations the parties can exclude the application of the said paragraph 2. This rule is only applicable to article 148 (2), thus even in B2C relations, the parties may exclude or derogate from or vary the effects of the other paragraphs of article 148.

The service provider may entrust performance to another person, unless personal performance by the service provider is required³¹⁶. If the service provider entrusts performance to another person, he remains responsible for performance³¹⁷, in B2C relations the parties may not, to the detriment of the consumer, exclude this rule or derogate from or vary its effects³¹⁸.

4. Exclusion of Liability for Lack of Conformity

4.1 Exclusion of Liability for Lack of Conformity of Goods and Digital Content

According to article 35 (3) CISG the seller is not liable under the criteria laid down in paragraphs (a) to (d) of article 35 (2) for any lack of conformity of the goods if at the time of the conclusion of the contract, the buyer knew or could not have been unaware of the lack of conformity. The exclusion of the seller’s liability does not apply to the characteristics that are required by the contract and that are subject to article 35(1). If the buyer only gains knowledge of the lack of conformity at the time of delivery or after inspection of the goods, the seller is liable for the lack of conformity of the goods. There is no lack of conformity when the buyer knew about the lack of conformity of the goods and still he bought the goods thus accepting the goods in that state. Regarding the buyer “*could not have been unaware*” of the lack of conformity, there should be an objective and clearly recognizable deficiency of the goods which must be obvious to the average

³¹⁴ Art. 148 (3) (b) CESL.

³¹⁵ Art. 148 (3) (c) CESL.

³¹⁶ Art. 150 (1) CESL.

³¹⁷ Art. 150 (2) CESL.

³¹⁸ Art. 150 (3) CESL.

buyer^{319/320}. The burden of proof is on the seller that the buyer knew or could not have been unaware of the lack of conformity of the goods. If the seller proves that the reasonable buyer could have been aware of the lack of conformity, he will not be held liable for the lack of conformity of the goods.

Article 2 (3) CSD establishes two situations when it shall be deemed not to be a lack of conformity. The PSCL has an exactly same provision in article 2 (3) with the same wording as that found in article 2 (3) CSD, therefore we will analyse both legal instruments together. The first situation foreseen in article 2 (3) CSD and PSCL that considers there not to be a lack of conformity is if at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity³²¹. It is at the time the contract was concluded that the consumer should be aware of the lack of conformity. The consumer knew that the goods had a defect and despite this he decided to buy the goods, therefore he agrees to buy goods with defects, thus there is no lack of conformity of the goods as the goods delivered conform to the contract. Article 2 (3) CSD and the PSCL also consider there not to be a lack of conformity if at the time the contract was concluded the consumer could not “*reasonably be unaware*” of the lack of conformity. Therefore, only when the lack of conformity is apparent and visible and the consumer cannot reasonably be unaware of it, for instance there is an express or tacit reference to it by the seller, should it be taken into account and the seller is not liable for the lack of conformity. The burden of proof is on the seller, if he proves that the reasonable buyer could have been aware of the lack of conformity, he will not be liable for the lack of conformity. The other situation that shall be deemed there not to be a lack

³¹⁹ C.M. Bianca, Op. Cit., p. 279 refers that “the seller is not liable for defects that the buyer should reasonably expect. Circumstances from which the buyer should reasonably deduce that the goods do not conform to the Convention standards are, for example: (a) the seller had usually sold in the past to the buyer poor quality goods without complaints from the buyer; or (b) the price corresponds to the price generally paid for poor quality goods”. John O Honnold, Op. Cit., considers that “an obligation based on facts of which one “could not have been unaware” are the facts that are before the eyes of one who can see”.

³²⁰ Judgement by the German (OLG) Provincial Court of Appeal of Koln of 21 May 1996 (Used Car case) decided that the seller sold a used car that he knew had been licensed two years earlier than indicated in the car’s documents and that the mileage was understated and not the actual mileage of the car and he did not inform the buyer of this, the seller acted fraudulently. The court held that art. 35 (3) CISG could not be relied on by a fraudulent seller and therefore was liable for the lack of conformity of the car, even if the buyer (a car dealer) should have detected the problem and thus considered even a very negligent buyer deserves more protection than a fraudulent seller.

³²¹ Pedro Romano Martinez, in “Empreitada de Bens de Consumo A Transposição da Directiva 1999/44/CE pelo D.L. nº 67/2003”, p. 29, refers that both the PSCL and the CSD are modelled on the assumption that the consumer does not have technical preparation – “he is not a technician nor is aware of that art – and the lack of conformity that he could not reasonably be unaware has to be perceived in that parameter”. Luís Manuel Teles de Menezes Leitão, Op. Cit., p. 54, states that the exclusion provided for is in relation to apparent defects or defects that the consumer knew about.

of conformity is if the lack of conformity has its origin in materials supplied by the consumer³²². The CISG does not foresee this situation. The lack of conformity of the materials supplied by the consumer is only considered as not being a lack of conformity if the seller cannot, at the time of delivery of the materials, detect the defects³²³. The seller should assess the suitability of the materials to carry out the work since he should know the materials to be used, if he does not do so, it is considered that the goods do not conform to the contract. If the seller cannot assess the materials before or if the consumer, despite the warnings made by the seller insists on using them, it is deemed not to be a lack of conformity of the goods. There has to be a causal link between the lack of conformity of the materials and the lack of conformity of the goods³²⁴. The CSD and PSCL exclude the lack of conformity of the goods in these two cases for the purposes of article 2, regarding the s criteria in the contract for the conformity in paragraph 1 and the legal criterion in paragraph 2, thus the exclusion of the seller's liability is possible in both cases. Whilst the CISG only excludes the seller's liability regarding the legal criterion in article 35 (2) (a) to (d).

Article 99 (3) CESL establishes that in a consumer sales contract, any agreement derogating from the requirements of the legal criteria for conformity of goods and digital content (art. 100), third party rights or claims requirements as well as from the limitation on conformity of digital content requirement, to the detriment of the consumer, is valid only if, at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods or the digital content and accepted the goods or the digital content as being in conformity with the contract when concluding it. It is not applicable to the subjective criteria. The consumer has to actually know of the specific condition of the goods or the digital content at the time of the conclusion of the contract and not when the goods are delivered or the digital content supplied, and has to accept the goods or the digital content as being in conformity with the contract when he concludes it. The seller has to prove that the consumer actually knew of the specific condition of the goods or the

³²² Jorge Morais Carvalho, *Op. Cit.*, p. 274, maintains that this provision should extend to situations when the lack of conformity "arises from projects, studies, predictions, machines, buildings or land". Judgement by the Coimbra Court of Appeal of 18-02-2014 (case no. 2817/09.1TBFIG.C1) states that the situations of lack of conformity with origin in materials supplied by the consumer developer should be considered equivalent, according to article 10 Portuguese Civil Code, to situations when the lack of conformity has its origin in projects, studies, forecasts, machines, buildings or land supplied by the developer and thus not be deemed lack of conformity for the purposes of the PSCL.

³²³ Jorge Morais Carvalho, *Op. Cit.*, p. 274. Pedro Romano Martinez, *Op. Cit.*, p. 27.

³²⁴ Jorge Morais Carvalho, *Op. Cit.*, p. 274.

digital content and accepted it. This provision is not applicable to B2B sales contracts. In a consumer sales contract, the parties may not, to the detriment of the consumer, exclude the application of this provision or derogate from or vary its effects³²⁵.

According to article 104 CESL, in a B2B contract, the seller is not liable for any lack of conformity of the goods, if at the time of the conclusion of the contract, the buyer knew or could not have been unaware of the lack of conformity. This provision is only applicable to sales of goods and not to supply of digital content as it only refers that the seller is not liable for any “*lack of conformity of the goods*”, not referring to the lack of conformity of digital content. It does not refer whether it is applicable to criteria in the contract for conformity (art. 99 (1)) or to the legal criteria for conformity (art. 100), thus it is applicable to both. The time at which the buyer knew or could not have been unaware of the lack of conformity is at the time of the conclusion of the contract. The buyer has to know or could not have been unaware of the lack of conformity, which is different from article 99 (3) CESL applicable to B2C sales that states that the buyer “knew” of the lack of conformity. Thus, when the lack of conformity is obvious to an average buyer, the seller’s liability is excluded. There is no provision like article 99 (4) CESL for B2B contracts that does not allow the parties to exclude the application of article 104 or derogate from or vary its effects, thus in B2B contracts the parties may agree that article 104 CESL is not applicable or derogate from it or vary its effects. Article 103 CESL establishes that the digital content is not considered as not conforming to the contract for the sole reason that updated digital content has become available after the conclusion of the contract. If after the conclusion of the contract, an updated version of the digital content is made available, the digital content is not considered as not conforming to the contract due to that fact.

Article 4 (3) OSD provides that the parties can exclude, derogate from or vary the effects of the legal requirements for conformity of the goods (art. 5) as well as the requirements regarding the correct installation of the goods, to the detriment of the consumer if, at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods and the consumer expressly accepted this specific condition when concluding the contract. In online and distance sales of goods the consumer can only know of the specific condition of the goods if the seller refers it to him as he does not see the goods beforehand.

³²⁵ Art. 99 (4) CESL.

This provision is not applicable to the criteria agreed by the parties and which form part of the contract under article 4 (1). The consumer has to actually know of the specific condition and has to expressly accept³²⁶ the specific condition when he concludes the contract. Therefore, the acceptance of the specific condition has to be made expressly and not impliedly. The time for the consumer to know of the specific conditions of the goods is at the time of the conclusion of the contract and not when the goods are delivered. This provision also provides for an agreement to exclude, derogate from or vary the effects of the lack of conformity resulting from the incorrect installation of the goods by the seller or under his responsibility or when the consumer installs the goods and the incorrect installation is due to a shortcoming in the installation instructions, as long as at the time of the conclusion of the contract the consumer knew of the specific condition of the goods or of the instructions and the he expressly accepted the specific condition when he concluded the contract. The burden of proof that the consumer knew of the specific condition of the goods and that he expressly accepted it when concluding the contract is on the seller. For some authors, article 4 (3) OSD also includes the situation when the lack of conformity has its origin in bad quality materials supplied by the consumer³²⁷. This provision does not expressly foresee this situation like the CSD and the PSCL.

Regarding the DCD, the supplier does not need to prove that the digital content is in conformity with the contract when he shows that the digital environment of the consumer is not compatible with the interoperability and other technical requirements of the digital content and that he informed the consumer of such requirement before the conclusion of the contract^{328/329}. It is required that the supplier informed the consumer of the compatibility requirements of his digital environment for the digital content supplied before the conclusion of the contract. The supplier has to prove that the digital

³²⁶ In the CESL in B2C contracts the consumer has to know of the specific condition of the goods or the digital content and has to accept the goods or the digital content as being in conformity with the contract. The acceptance does not need to be expressly.

³²⁷ Esther Arroyo Amayuelas, *Op. Cit.*, p. 14.

³²⁸ Art. 9 (2) DCD.

³²⁹ Recital 33 DCD provides that “without prejudice to the fundamental rights to the protection of private life, including confidentiality of communications, and the protection of personal data of the consumer, the consumer should cooperate with the supplier in order to allow the supplier to ascertain the consumer's digital environment with the use of the least intrusive means which are at the disposal of both parties in the circumstances. This may often be done for instance by providing the supplier with automatically generated incident reports or details of the consumer's internet connection. Only in exceptional and duly justified circumstances where with the best use of all other means there is no other way possible, this may also be done by allowing virtual access to the consumer's digital environment. However, where the consumer does not cooperate with the supplier, it should be for the consumer to prove that the digital content is not in conformity with the contract”.

environment of the consumer is not compatible with interoperability and other technical requirements of the digital content and that he informed the consumer of those requirements before the conclusion of the contract, for instance in advertisements, leaflets, brochures, catalogues, clauses of the contracts, etc. According to article 9 (3) DCD, the consumer is to cooperate with the supplier to the extent possible and necessary to determine the consumer's digital environment. The obligation to cooperate is limited to the technically available means which are the least intrusive for the consumer. When the consumer fails to cooperate, the burden of proof regarding the non-conformity with the contract is on the consumer.

4.2 Exclusion of the Seller's Liability in Third Party Rights

Article 42 (2) CISG provides that the seller is not obliged to deliver goods free from any right or claim of a third party based on industrial property or other intellectual property in two situations. Firstly, when at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim. The other situation is when the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer. This provision is only applicable to third party rights or claims based on industrial property or other intellectual property, it is not applicable to other third party rights or claims. The parties to a contract may exclude the application of the CISG or derogate from or vary the effect of the provision on third party rights, that is, articles 41 and 42.

Neither the CSD nor the PSCL have a similar provision.

According to article 102 (3) CESL, in B2B contracts the goods do not have to be free from and the digital content cleared of any right or not obviously unfounded claim based on intellectual property, when the buyer knew or could be expected to have known of the rights or claims based on intellectual property at the time of the conclusion of the contract. This provision is only applicable to third party rights or claims based on intellectual property, thus there is no exclusion regarding other third party rights. In B2C contracts, under article 102 (4) CESL the goods do not have to be free from and the digital content cleared of any right or not obviously unfounded claim based on intellectual property, when the consumer knew of the rights or claims based on intellectual property at the time of the conclusion of the contract. This provision is only applicable to rights or claims based on intellectual property and is not to other third party rights. Paragraphs 3 and 4 of

article 102 CESL are practically the same, the difference is that in B2B contracts the buyer knew or could be expected to have known of the rights or claims based on intellectual property at the time of the conclusion of the contract. Whilst, in B2C contracts, the consumer must actually know of the rights or claims based on intellectual property at the time of the conclusion of the contract, there is no room for situations where the consumer is expected to know of those rights and claims as in B2B contracts. There is no provision in the CESL, like the CISG, as to the exclusion of the applicability of the rules on the goods and digital content being free from rights or claims based on intellectual property, when the right or claim results from the seller's compliance with technical drawings, designs, formulae or other specifications furnished by the buyer, whether he is a trader or a consumer. Under article 102 (5) CESL, in B2C contracts, the parties may not, to the detriment of the consumer, exclude the application of article 102 or derogate from or vary its effects. In B2B contracts the parties may exclude the application of article 102 on third party rights or claims or derogate from or vary its effects. According to article 99 (3) CESL, in B2C sales contracts, any agreement derogating from the requirements of the goods being free from and the digital content being clear of any right or claim of a third party, including those based on intellectual property, to the detriment of the consumer, is valid only if, at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods or the digital content and accepted the goods or the digital content as being in conformity with the contract when he concluded it. In B2C sales contracts, the parties, may not, to the detriment of the consumer, exclude the application of article 99 (3) or derogate from or vary its effects³³⁰. This does not apply to B2B contracts.

There is no provision in the OSD that excludes the seller's liability regarding third party rights, when the consumer knew of the third parties rights based on intellectual property, at the time of the conclusion of the contract. It seems that even if the consumer knows of the third party rights at the time of the conclusion of the contract that he does not lose the right to have the goods free of third party rights based on intellectual property. Moreover article 4 (2) OSD provides that for the goods to conform to the contract they must meet the requirements in article 4 (1), the requirements in article 5, the correct installation requirement as well as the third party rights requirement. An agreement to exclude, derogate from or vary the effects of the provision on third party rights, thus allowing the

³³⁰ Art. 99 (4) CESL.

goods to have third party rights, including based on intellectual property, is invalid even if at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods and the consumer expressly accepted the goods with third party rights when he concluded the contract, according to article 4 (3) a contrario and article 18 OSD.

The DCD does not contain a provision that excludes the supplier's liability as to third party rights in the case the supplier knows at the time of the conclusion of the contract of third party rights based on intellectual property. The digital content to conform to the contract must meet the requirements in the contract (art. 6 (1), should the contract not stipulate these or it be unclear, the requirements in article 6 (2) as well as the integration of the digital content requirement and the third party rights requirement. Furthermore, a contractual term cannot exclude the application of the national measures transposing the DCD, derogate from or vary their effects before the lack of conformity with the contract is brought to the supplier's attention by the consumer and if it occurs it shall not be binding on the consumer, according to article 19 DCD.

6. CONCLUSION

The CSD and the PSCL start off from the concept of conformity of goods found in the CISG. The CSD and the PSCL are in general more favourable to the buyer than the CISG due to the fact that the former are applicable to consumers thus All the legal instruments under analysis require that the goods or the digital content be supplied in conformity to the contract and to that provided in the contract. They also provide legal criteria for conformity to the contract when the contract does not establish criteria as well as when it does not foresee the specific legal criterion. The legal criteria are fundamental to protect the buyer and subjective and objective legal criteria are found in all the legal instruments. The subjective legal criterion is the criterion that the parties agreed upon although it is not expressly foreseen in the contract, whilst the objective legal criteria are those that the parties did not foresee in the contract nor did they agree on, they are determined by other factors like the same type of goods, the parties' expectations, etc. The objective criteria are especially important in that they protect the buyer more than the subjective criteria as the subjective criteria are agreed upon by the parties and often it is the seller that shows the sample or gives the description of the goods and presents the contract leaving the

buyer more unprotected in regard to the seller. The seller has no control over the objective criteria.

The CSD, PSCL, OSD and CESL are more protective of the buyer/consumer than the CISG, for instance they have a legal objective criteria regarding the consumer's reasonable expectations concerning the quality and performance of the goods of the same type which is not foreseen in the CISG. Another situation is the fact that the CISG establishes an exception to the criterion of fitness of the goods for any particular purpose made known to the seller at the time of the conclusion of the contract when the circumstances show that the buyer could not rely or that it was unreasonable for him to rely on the seller's skill and judgement. This is not foreseen in the CSD, PSCL, OSD and DCD, which are more protective of the consumer. In the CISG the parties can agree otherwise regarding the objective criteria in the contract and can under article 6 exclude, derogate from or vary the effect of article 35. This is not so in the other legal instruments in which consumers are at stake which are considered the weaker contracting party and in need of protection. In the other legal instruments there are rules in order to exclude, derogate or vary the effects of the requirements and only under certain circumstances is it possible. Moreover, the CSD, PSCL, DCD, CESL (regarding B2C contracts – art. 108), OSD have a mandatory nature in that any agreement, which to the detriment of the consumer, excludes the application of the national measures regarding the conformity requirements, derogates from them or varies their effect before the lack of conformity with the contract is brought to the seller's attention by the consumer is not binding on the consumer. In so doing these legal instruments protect the consumer.

The CESL is clearly the basis for the DCD and OSD, although there are some differences between them and the CESL regarding the concept of conformity. The CESL introduced the conformity of digital content. It is fundamental that the DCD be adopted since regarding digital content there is no harmonised legal instrument that specifically foresees requirements for the conformity of digital content with the contract which creates some uncertainty in these types of contracts regarding what is considered as conformity with the contract as well as what are the rights of consumers in these types of contracts. The DCD could be a means of protecting consumers in contracts that involve digital content and thus making the legal regime in these types of contracts clearer as well as taking into account the specificity of the digital content in the requirements for conformity of the

digital content which is not found in any of the other legal instruments under analysis, other than the CESL.

ANNEX I

	Types of Contracts	Types of Goods	Personal Scope of Application	Territorial Scope of Application	Subject Matter
CISG	<ul style="list-style-type: none"> - Contracts for the sale of goods; - Contracts for the supply of goods to be manufactured or produced, unless the party who orders the goods undertakes to supply a substantial part of the materials; - Contracts in which the obligations of the party who furnishes the goods does not consist preponderantly in the supply of labour or other services; - Distance sales contracts; - On premises contracts. <p>Not applicable to:</p> <ul style="list-style-type: none"> i. Distribution and franchising agreements; ii. Sales by auction or on execution or otherwise authority of law; iii. Barter contracts? iv. Lease contracts? 	<ul style="list-style-type: none"> - Tangible movable goods; - Software irrespective whether delivered electronically or on tangible media, <p>Not applicable to:</p> <ul style="list-style-type: none"> i. Goods bought for personal, family or household use – consumer goods; ii. Stocks, shares, investment securities, negotiable instruments or money; iii. Ships, vessels, hovercraft or aircraft; iv. Electricity. v. Intangibles. 	<ul style="list-style-type: none"> - B2B sales; - Dual purpose contracts: for private use and professional use. - Not applicable to sales of goods to bought by consumers for personal family or household use (consumers), unless the seller at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for such use. - Nationality of the parties or the civil or commercial character of the parties or of the contract is not to be taken into consideration in determining the application of the CISG. 	<p>Applies to contracts of sale of goods between parties whose places of business are in different States:</p> <p>(a) when the States are Contracting States; or</p> <p>(b) When the rules of private international law lead to the application of the law of a Contracting State, unless the parties made a declaration of not being bound by article 1 (1) (b) under article 95.</p> <p>The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from the dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract.</p> <p>CISG does not establish the point in time to determine whether the parties have places of business in different States.</p>	<ul style="list-style-type: none"> - Formation of the contract of sale; - Rights and obligations of the seller and buyer arising from the contract. <p>Not concerned with:</p> <ul style="list-style-type: none"> - Validity of the contract or any of its provisions or of any usage; - Effect which the contract may have on the property in the goods sold; - Liability of the seller for death or personal injury caused by the goods to any person.
CSD	<ul style="list-style-type: none"> - Sales of consumer goods contracts - Contracts for the supply of consumer goods to be manufactured or produced; - Contracts when the installation of the goods by the seller or under his responsibility forms part of the contract of sale of goods; - On premises contracts; 	<ul style="list-style-type: none"> - Tangible movable consumer goods; - Sale of water and gas in limited quantities; - Digital content on a tangible media - applicable to the tangible media; - Second-hand goods; - Member-states may exclude from consumer goods when transposing the CSD, second- 	<ul style="list-style-type: none"> - Sale of goods to consumers; - “<i>Consumer</i>”: any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession”- (article 1 (2) (a). - “<i>seller</i>”: shall mean any natural or legal person who, under a contract, sells consumer goods 	<ul style="list-style-type: none"> - Addressed to Member States which have to transpose it by adopting provisions of national law that comply with the measures in the CSD. - Domestic sales; - International sales when art. 6 Rome I Regulation establishes the 	<ul style="list-style-type: none"> - Certain aspects of the sale of consumer goods and associated guarantees; - Conformity of goods, - Consumer rights; - Right of redress; - Commercial guarantees.

	<ul style="list-style-type: none"> - Distance sales contracts. <p>Not applicable to:</p> <ul style="list-style-type: none"> i. After sales, mere repair or maintenance of goods that the consumer already has; ii. Consumer lease of goods contracts; iii. Consumer donation contracts. 	<p>hand goods sold at public auction where consumers have the opportunity of attending the sale in person.</p> <p>Not applicable to:</p> <ul style="list-style-type: none"> i. Immovables; ii. Intangible goods; iii. Goods sold by way of execution or otherwise by authority of law; iv. Water and gas where they are not put for sale in a limited volume or set quantity; v. Electricity; vi. Digital content. 	<p>in the course of his trade, business or profession” (Article 1 (2) (c);</p> <ul style="list-style-type: none"> - Dual purpose contracts: goods used predominantly for private use. <p>Not applicable to:</p> <ul style="list-style-type: none"> i. B2B sales; ii. Sales between non-professionals; iii. Professional buys goods from a consumer; iv. Dual purpose contracts: goods used predominantly for professional use. 	<p>competence of a Member State of the EU.</p>	
PSCL	<ul style="list-style-type: none"> - Sales contracts concluded between professionals and consumers; - Consumer Barter contracts; - Consumer goods supplied under or under a provision of services contract; - Leasing of consumer goods - Installation of goods when it forms part of the sales contract; - On premises contracts; - Distance sales contracts. <p>Not applicable to:</p> <ul style="list-style-type: none"> i. Mere repair or maintenance of goods that belong to the consumer; ii. Consumer donation contracts. 	<ul style="list-style-type: none"> - Tangible movable goods; - Immovables; - Second-hand goods; - Software on tangible media; - Water; - Gas; - Electricity; - Second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person and when they do not have the opportunity of attending the sale in person. <p>Not applicable to:</p> <ul style="list-style-type: none"> i. Intangible goods; ii. Digital content downloaded; 	<ul style="list-style-type: none"> - Contracts concluded between professionals and consumers; - Article 1-B (1) (a): “For the purposes of this decree-law, “Consumer” shall mean the person to whom goods are supplied, services supplied or any other rights transferred, for non-professional, by a person which performs an economic activity on a professional basis whose purpose is to gain profits, under paragraph 1 of article 2 of the Law no. 24/96 of the 31st of July”; - Dual purpose contracts: goods used predominantly for private use. <p>Not applicable to:</p> <ul style="list-style-type: none"> i. B2B contracts; ii. Sales between non-professionals; 	<ul style="list-style-type: none"> - Domestic contracts; - International consumer sales contracts when according to Rome I Regulation the Portuguese law is applicable to the contract. 	<ul style="list-style-type: none"> - Conformity with the contract; - Delivery of goods; - Consumer rights; - Guarantee period; - Period for the exercise of rights; - Direct responsibility of the producer; - Right of redress; - Voluntary guarantees.

			<ul style="list-style-type: none"> iii. Professional buys goods from a consumer; iv. Dual purpose contracts: goods used predominantly for professional use. 		
OSD	<ul style="list-style-type: none"> - Distance sales contracts concluded between the seller and the consumer; - Sales contracts when there is the installation of the goods by the seller or under his responsibility; - Contracts for goods to be manufactured or produced; - Sales contract for the provision of goods and provision of services: only applicable to the sales of goods. <p>Not applicable to:</p> <ul style="list-style-type: none"> i. Distance sales contracts for the provision of services; ii. On premises contracts. 	<ul style="list-style-type: none"> - Tangible movable goods; - Second-hand goods; - Water, gas and electricity put up for sale in a limited volume of a set quantity; - Smart goods. <p>Not applicable to:</p> <ul style="list-style-type: none"> iii. Items sold by way of execution or otherwise authority of law; iv. Water, gas and electricity not put up for sale in a limited volume or a set quantity; v. Durable medium incorporating digital content where the durable medium is used exclusively as a carrier for the supply of digital content 	<ul style="list-style-type: none"> - B2C contracts; <p>“consumer means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession” - (article 2 (b));</p> <p>“seller” means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive” - (article 2 s(c)).</p> <ul style="list-style-type: none"> - Dual purpose contracts: goods used predominantly for private use. <p>Not applicable to:</p> <ul style="list-style-type: none"> v. B2B contracts; vi. Sales between non-professionals; vii. Professional buys goods from a consumer; i. Dual purpose contracts: goods used predominantly for professional use. 	<ul style="list-style-type: none"> - Addressed to Member States which have to transpose it by adopting national laws to comply with it. - Domestic transactions - Cross-border transactions when the conflict of law rules appoint the national law applicable. 	<ul style="list-style-type: none"> - Certain requirements relating to distance sales contracts. - Rules on conformity of goods; - Remedies in case of non-conformity; - Modalities for the exercise of the remedies; - Commercial guarantees.
DCD	<ul style="list-style-type: none"> - Contracts for the Supply of Digital Content in exchange for a price or when the consumer actively provides counter-performance other than in money in the form of personal data or other data; 	<ul style="list-style-type: none"> - Digital content supplied on tangible medium or downloaded; vi. Data produced and supplied in digital form, e.g., video, audio, applications, digital games and any other software; 	<ul style="list-style-type: none"> - Contracts where the supplier supplies digital content to consumers; - “consumer means any natural person who in contracts covered by this Directive, is acting for purposes which are 	<ul style="list-style-type: none"> - Addressed to Member States which have to transpose it by adopting national laws to comply with it; - Domestic transactions; 	<ul style="list-style-type: none"> - Certain requirements concerning contracts for the supply of digital content to consumers; - Rules on conformity of digital content with the contract;

	<ul style="list-style-type: none"> - Distance sales; - On premises sales; - Contracts which include elements in addition to the supply of digital content: only applicable to the digital content part. <p>Not applicable to :</p> <ul style="list-style-type: none"> i. Contracts where the consumer does not actively provide counter-performance in the form of personal data or any other data when a price is not to be paid; ii. Contracts regarding services performed with a predominant element of human intervention by the supplier when the digital content is used mainly as a carrier; iii. Contracts regarding electronic communication services; iv. Contracts regarding healthcare; v. Contracts regarding gambling services, like lotteries, casino games, poker games and betting transactions by electronic means and at the individual request of a recipient of a service; 	<ul style="list-style-type: none"> vii. Service allowing the creation, processing or storage of data in digital form, where data is provided by the consumer; viii. Service which allows sharing of and other interaction with data in digital form provided by other users of the service. <ul style="list-style-type: none"> - Supply of digital of digital content developed according to consumer's specifications; - Durable medium incorporating digital content where the durable medium is exclusively used as a carrier of the digital content; - Supply of visual modelling files required in the context of 3D printing. <p>Not applicable to:</p> <ul style="list-style-type: none"> i. Digital content embedded in goods in such a way that it operates as an integral part of the goods and its functions are subordinate to the main functionalities of the goods, e.g. smart goods; ii. Issues of liability related to Internet of Things. 	<p>outside that person's trade, business, craft, or profession”</p> <p>- Article 2 (4);</p> <p>- “Supplier means any natural person or legal person, irrespective of whether privately or publicly owned, who is acting, including through any person acting in his name or on his behalf, for purposes relating to that person's trade, business, craft or profession” – article 2 (3).</p> <p>Not applicable to:</p> <ul style="list-style-type: none"> - B2B contracts; - Sales between non-professionals; - Professional buys goods from a consumer. 	<ul style="list-style-type: none"> - Cross-border transactions when the conflict of law rules appoint the national law applicable. 	<ul style="list-style-type: none"> - Remedies in case of non-conformity; - Modalities for the exercise of the remedies; - Modification and termination of such contracts.
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	vi. Contracts regarding financial services.				
CESL	<ul style="list-style-type: none"> - Sales contracts; - Contracts for the supply of digital content whether or not in exchange for a price; - Related Service Contracts, like installation, maintenance, repair or any other processing, provided by the seller of the goods or the supplier of digital content under the sales contract, the contract for the supply of digital content; - Distance contracts; - Off-premises contracts; - Supply of goods to be manufactured or produced; - Consumer sales contracts when the goods or digital content is installed by seller or under his responsibility; - Public auctions where goods or digital content are offered by the trader to the consumer who attends or is given the opportunity to attend the auction in person; - B2B contracts: trader grants credit; - Contracts where goods, digital content or related services of the same kind are supplied on a continuing basis and the consumer pays for such goods, digital content or related services 	<ul style="list-style-type: none"> - Tangible movable goods; - Second-hand goods, - Water and other types of gas put up for sale in a limited volume of quantity; - Digital content produced and supplied in digital form or on a tangible medium, irrespective of being according to the buyer's specifications, like video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalise existing hardware or software. <p>Not applicable to:</p> <ol style="list-style-type: none"> Intangibles; Electricity and natural gas; Water and other types of gas not put up for sale in a limited volume or quantity; Financial services, including online banking; Legal or financial advice provided in electronic form; Electronic healthcare services; Gambling; Creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creation of other users. 	<ul style="list-style-type: none"> - Contracts with consumers as long as seller or supplier of the digital content is a trader; - Contracts when all parties are traders, but at least one is a SME; - Member States may make the CESL available to contracts where all parties are traders and none of them is a SME. 	<ul style="list-style-type: none"> - Cross-border contracts if the parties agree that the CESL governs their cross-border contracts; - To determine whether the contract is a cross-border contract the relevant point in time is the time of the agreement on the use of the CESL; - Not applicable to sales within a Member State, however article 13 Regulation on CESL enables Member States to make the CESL available for contracts that are not cross-border; - Second national law regime within the law of each Member State, which exists alongside the pre-existing rules of national contract law; - Recital 25 CESL states that where the CISG would be applicable to the contract that the choice of the CESL by the parties implies an agreement by them to exclude the CISG from the contract, thus only being applicable to the contract the CESL. 	<ul style="list-style-type: none"> - Pre-contractual duties; - Conclusion of the contract; - Defects in consent; - Contents and effects of the contract; - Unfair contract terms; - Obligations and remedies of both parties; - Passing of risk; - Damages and interest; - Restitution - Prescription. <p>Not cover:</p> <ul style="list-style-type: none"> - Legal personality; - Invalidity of the contract arising from lack of capacity, illegality or immorality; - Determination of the language of the contract; - Matters on non-discrimination; - Representation; - Plurality of debtors and creditors; - Change of parties including assignment; - Set-off and merger; - Transfer of ownership; - Intellectual property law and the law of torts; - Whether concurrent contractual and non-

	<p>for the duration of the supply by means of instalments.</p> <p>Not applicable to related services of:</p> <ul style="list-style-type: none"> i. Transport services; ii. Training services; iii. Telecommunications support services; iv. Financial services. <p>- Not applicable to:</p> <ul style="list-style-type: none"> i. Contracts for the sale on execution or otherwise involving the exercise of public authority; ii. Mixed purpose contracts including other elements than the sale of goods, the supply of digital content and the provision of related services – leasing contracts and donation contracts; iii. B2C contracts: granting of consumer credit e.g. deferred payment, loan or other similar financial accommodation. 				contractual liability claims can be pursued together.
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	Conformity with the contract	Legal Criteria for Conformity	Compliance with the description given by the buyer	Possess the qualities of the goods which the seller held out as a sample or model
CISG	Article 35: “(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged <u>in</u> the manner required by the contract.”	<ul style="list-style-type: none"> - In article 35 (2); - Applicable when parties have not excluded the legal criteria. 		Article 35 (2):The goods do not conform to the contract unless they: “(c) Possess the qualities of goods which the seller has held out to the buyer as a sample or model”.
CSD	Article 2 (1): “The seller must deliver goods to the consumer which are in conformity with the contract of sale”.	<ul style="list-style-type: none"> - Article 2 (2): “Consumer goods are presumed to be in conformity with the contract if they:” - Applicable when there are no specific contract terms regarding the characteristics or functions of the goods or when the minimum protection clause is applicable; - Criteria set out in a positive manner; - The requirements are cumulative if one is not met, the goods do not conform with the contract; - Rebuttable presumption; - Presumption means that the consumer may prove the lack of conformity with the contract, although the lack of conformity does not result from the criteria defined in the legal instrument; - If the goods render a certain requirement inappropriate then that requirement does not need to be fulfilled but the remaining requirements do. 	Article 2 (2) (a): “comply with the description given by the seller”	Article 2 (2) (a): Consumer goods are presumed to be in conformity with the contract if they “possess the qualities of the goods which the seller has held out to the consumer as a sample or model”.
PSCL	Article 2 (1): “The seller must deliver goods to the consumer which are in conformity with the contract of sale”.	<ul style="list-style-type: none"> - Article 2 (2): “Consumer goods are presumed not to be in conformity with the contract, if any of the following facts are met:..”. - Criteria applicable when the parties do not lay down the specific requirements of the goods in the contract or when they do not contemplate the situations that are in the legal criteria. 	Article 2 (2) (a): “do not comply with the description given by the seller..”.	Article 2 (2) (a): Consumer goods are presumed not to be in conformity with the contract if they “do not possess the qualities of the goods which the seller has held out to the consumer as a sample or model”.

		<ul style="list-style-type: none"> - Criteria formulated in a negative manner; - It is not a real presumption – the verification of the lack of conformity excludes the possibility of any evidence to the contrary, it is not possible to the conformity of non-conformity goods; - If one of the criteria listed in the sub-paragraphs of paragraph 2 of article 2 are met, goods are considered to be non-conforming; - If the goods render a certain requirement inappropriate then that requirement does not need to be fulfilled but the remaining requirements do. 		
OSD	<p>Article 4 (1): “The seller shall ensure that, in order to conform with the contract, the goods shall, where relevant:</p> <p>(a) Be of quantity, quality and description required by the contract, which includes that where the seller shows a sample or a model to the consumer, the goods shall possess the quality of and correspond to the description of this sample or model;</p> <p>(b) Be fit for any particular purpose for which the consumer requires them and which the consumer made known to the seller at the time of the conclusion of the contract and which the seller accepted; and</p> <p>(c) Possess the qualities and performance capabilities indicated in any pre-contractual statement which forms an integral part of the contract.</p> <ul style="list-style-type: none"> - Cumulative criteria joined by the word “and”; - “Where relevant” indicates criteria applicable depending on specific characteristics of the goods, should 	<ul style="list-style-type: none"> - In article 5 which establishes “The goods shall, where relevant:.” - The “ goods shall” – goods have to meet the requirements in article 5 in order to conform to the contract; - The sub-paragraphs are joined by the word “and”, in order for the goods to conform to the contract they must fulfil all the requirements in the sub-paragraphs; - Refers to “where relevant” which means if the characteristics of the goods render a certain requirement inappropriate then that requirement does not need to be fulfilled but the remaining requirements do. 	Article 4 paragraph 1(c): The goods shall “possess the qualities and performance capabilities indicated in any pre-contractual statement which forms an integral part of the contract”.	Article 4 (1) (a): “where the seller shows a sample or a model to the consumer, the goods shall possess the quality of and correspond to the description of this sample or model”.

	one criteria not be applicable the remaining are.			
DCD	<p>Article 6 (1): “In order to conform with the contract, the digital content shall, where relevant:</p> <ul style="list-style-type: none"> (a) Be of quantity, quality, duration and version and shall possess functionality, interoperability and other performance features such as accessibility, continuity and security as required by the contract, including in any pre-contractual information which forms an integral part of the contract; (b) Be fit for any particular purpose for which the consumer requires it and which the consumer made known to the supplier at the time of the conclusion of the contract and which the supplier accepted; and (c) Be supplied along with any instructions and customer assistance as stipulated by the contract; and (d) Be updated as stipulated by the contract. <ul style="list-style-type: none"> - Cumulative criteria joined by the word “and”; - “Where relevant” indicates criteria applicable depending on specific characteristics of the goods, should one criteria not be applicable the remaining are. 	<ul style="list-style-type: none"> - Article 6 (2): “To the extent that the contract does not stipulate, where relevant, in a clear and comprehensive manner, the requirements for the digital content under paragraph 1, the digital content shall be fit for the purposes for which digital content of the same description would normally be used including its functionality, interoperability and other performance features such as accessibility, continuity and security, taking into account”; - Lays down the requirements in the case that the contract does not stipulate the requirements for the digital content or is unclear; - Refers to “where relevant” which means if the characteristics of the digital content render a certain requirement inappropriate then that requirement does not need to be fulfilled but the remaining requirements do; - The sub-paragraphs are joined by the word “and”, in order for the digital content to conform to the contract it must fulfil all the requirements in the sub-paragraphs; - 	<p>Article 6 (1) sub-paragraph a): “be of the quantity, quality, duration and version and shall possess functionality, interoperability and other performance features such as accessibility, continuity and security, as required by the contract including in any pre-contractual information which forms integral part of the contract”.</p>	
CESL	<p>Article 99 paragraph 1 Annex I (CESL): “In order to conform with the contract, the goods or digital content must:</p> <ul style="list-style-type: none"> (a) be of the quantity, quality and description required by the contract; (b) be contained or packaged in the manner required by the contract; and 	<ul style="list-style-type: none"> - Article 100: “The goods or digital content must.”; - Drafted in a positive manner; - “Must” indicates an obligation; - Sub-paragraphs from a) to g) are joined by “and”, which indicates that all the criteria must be complied with in order for the goods 	<p>Article 100 (f): the goods or the digital content must “possess the qualities and performance capabilities indicated in any pre-contractual statement which forms part of the contract terms by virtue of Article 69”.</p> <p>Article 69 (1) and (2): Where the trader or someone that is engaged in advertising or marketing for the</p>	<p>Article 100 (c): the goods or the digital content must “possess the qualities of goods or digital content which the seller held out to the buyer as a sample or model”.</p>

	(c) be supplied along with any accessories, installation instructions or other instructions required by the contract”.	or digital content to be in conformity, should one of the criteria not be met the goods or digital content are not in conformity.	trader makes a statement before the contract is concluded, either to the other party, about the characteristics of what is to be supplied by that trader under the contract, the statement is incorporated as a term of the contract unless: (a) the other party was aware, or could be expected to have been aware when the contract was concluded that the statement was incorrect or could not otherwise be relied on as such a term; or (b) the other party’s decision to conclude the contract could not have been influenced by the statement.”	
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	Fit for any particular purpose for which the consumer requires them and which he made known to the seller	Fitness for normal uses	Are contained or packaged in the usual manner	Conformity with the quality and performance which the consumer can reasonably expect taking into account public statements
CISG	Article 35 (2): The goods do not conform with the contract unless they: “(b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller’s skill and judgement”. - Seller has to expressly or impliedly agree to the particular purpose.	Article 35 (2) (a): The goods do not conform to the contract unless they “are fit for the purposes for which goods of the same description would ordinarily be used”.	Article 35 (2) (d) The goods do not conform to the contract unless they “are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods”.	
CSD	Article 2 (2) (b): Consumer goods are presumed to be in conformity with the contract if they “are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted”.	Article 2 (2) (c): Consumer goods are presumed to be in conformity with the contract if they “are fit for the purposes for which goods of the same type are normally used”.		Article 2 (2) (d): Consumer goods are presumed to be in conformity with the contract if they “show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.”. - Recitals 8: “The quality and performance which consumers can reasonably expect will depend <i>inter alia</i> on whether the goods are new or second-hand. Article 2 (4): “The seller shall not be bound by public statements, as referred to in paragraph 2(d) if he: - shows that he was not, and could not reasonably have been, aware of the statement in question, - shows that by the time of conclusion of the contract the statement had been corrected, or - shows that the decision to buy the consumer goods could not have been influenced by the statement”.
PSCL	Article 2 (2) (b): Consumer goods are presumed not to be in conformity with the contract if they “are not fit for any particular use for which the consumer requires them and which he made known to the seller	Article 2 (2) (c): Consumer goods are presumed not to be in conformity with the contract if they “are not fit for the purposes for which goods of the same type are normally used”.		Article 2 (2) (d): Consumer goods are presumed not to be in conformity with the contract if they “do not show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public

	at the time of conclusion of the contract and which the seller has accepted”.			statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, namely in advertising or on labelling”.. Article 7 paragraph 5 Consumer Protection Law: “The specific and objective information in advertising of certain goods, service or right is considered part of the contents of the contracts which will be concluded after its issue, thus considered not written the contractual clauses to the contrary”.
OSD	Article 4 (1) (b): The goods shall “be fit for any particular purpose for which the consumer requires them and which the consumer made known to the seller at the time of the conclusion of the contract and which the seller has accepted”.	Article 5 (a): The goods shall “be fit for all the purposes for which goods of the same description would ordinarily be used”.	Article 5 (b): The goods shall be delivered along with packaging as the consumer may expect to receive.	Article 5 (c): The goods shall “possess qualities and performance capabilities which are normal in goods of the same type and which the consumer may expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller or other persons in earlier links of the chain of transactions, including the producer, unless the seller shows that: (i) the seller was not, and could not reasonably have been, aware of the statement in question; (ii) unless the supplier shows that (ii) by the time of conclusion of the contract the statement had been corrected; or (iii) the decision to buy the goods could not have been influenced by the statement”.
DCD	Article 6 (1) (b): The digital content shall “be fit for any particular purpose for which the consumer requires it and which the consumer made known to the supplier at the time of the conclusion of the contract and which the supplier accepted”.	Article 6 (2) “The digital content shall be fit for the purposes for which digital content of the same description would normally be used including its functionality, interoperability and other performance features such as accessibility, continuity and security, taking into account: (a) Whether the digital content is supplied in exchange for a price other counter-performance than money; (b) Where relevant, any existing international technical standards or, in the absence of such technical standards, applicable		- Does not contain a provision concerning the consumer’s legitimate expectations concerning the qualities and performance capabilities of the digital content. - Article 6 (2) (c): takes into account as one of the elements in the requirement that the goods be fit for the purposes for which digital content of the same description would normally be used, “any public statement made by or on behalf of the supplier or other persons in earlier links of the chain of transactions, unless the supplier shows that: (i) He was not, and could not reasonably have been, aware of the statement in question; (ii) By the time of conclusion of the contract the statement had been corrected;

		<p>industry codes of conduct and good practices; and</p> <p>(c) Any public statement made by or on behalf of the supplier or other persons in earlier links of the chain of transactions unless the supplier shows that:</p> <p>(i) He was not and could not reasonably have been aware of the statement in question;</p> <p>(ii) By the time of conclusion of the contract the statement had been corrected;</p> <p>(iii) The decision to acquire the digital content could not have been influenced by the statement”.</p>		<p>(iii) The decision to acquire the digital content could not have been influenced by the statement”.</p>
CESL	<p>Article 100 (a): The goods or digital content must “be fit for any particular purpose made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller’s skill and judgement”.</p>	<p>Article 100 (b): The goods or digital content must “be fit for the purposes for which goods or digital content of the same description would ordinarily be used”.</p>	<p>Article 100 (d): The goods or digital content must “be contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods”.</p>	<p>Article 100 (g): The goods or digital content must “possess such qualities and performance capabilities as the buyer may expect. When determining what the consumer may expect of the digital content regard is to be had to whether or not the digital content was supplied in exchange for the payment of a price”.</p> <p>Article 100 (f):”The goods or digital content must possess the qualities and performance capabilities indicated in any pre-contractual statement which forms part of the contract terms according to article 69”.</p> <p>Article 69 (1) and (2): Where the trader or a person engaged in advertising or marketing makes a statement before the contract is concluded, either to the other party or publicly, about the characteristics of what is to be supplied by that trader under the contract, the statement is incorporated as a term of the contract unless:</p> <p>(a) the other party was aware, or could be expected to have been aware when the contract was concluded that the statement was incorrect or could not otherwise be relied on as such a term; or</p> <p>(b) the other party’s decision to conclude the contract could not have been influenced by the statement.</p>

				<p>Article 69 (3): “Where the other party is a consumer then, for the purposes of paragraph 1, a public statement made by or on behalf of a producer or other person in earlier links of the chain of transactions leading to the contract is regarded as being made by the trader unless the trader, at the time of conclusion of the contract, did not know and could not be expected to have known of it”.</p> <p>Article 69 (4): “In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects”.</p>
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	Digital Content be Updated	Delivered along with such accessories including packaging, installation instructions or other instructions as the consumer may expect to receive	Conformity of the installation and installation instructions	Third Party Rights
CISG				<p>Article 41: “The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller’s obligation is governed by article 42”.</p> <p>Article 42: “(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:</p> <p>(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or</p> <p>(b) in any other case, under the law of the State where the buyer has his place of business”.</p>
CSD			Article 2 (5): “Any lack of conformity resulting from incorrect installation of the consumer goods shall be deemed to be equivalent to lack of conformity of the goods if installation forms part of the contract of sale of the goods and the goods were installed by the seller or under his responsibility. This shall apply equally if the product, intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions”.	
PSCL			Article 2 (4): “Any lack of conformity resulting from incorrect installation of the consumer	

			goods shall be deemed to be equivalent to lack of conformity of the goods if installation forms part of the contract of sales and the goods were installed by the buyer or under his responsibility, or when product, intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to shortcomings in the installation instructions".	
OSD		Article 5 (b): The goods shall "be delivered along with such accessories including packaging, installation instructions or other instructions as the consumer may expect to receive".	Article 6: "Where the goods are incorrectly installed, any lack of conformity resulting from the incorrect installation is regarded as lack of conformity with the contract of the goods if: (a) the goods were installed by the seller or under the seller's responsibility; or (b) the goods, intended to be installed by the consumer, were installed by the consumer and the incorrect installation was due to a shortcoming in the installation instructions".	Article 7:"At the time relevant for establishing the conformity with the contract as determined by Article 8, the goods must be free from any right of a third party, including based on intellectual property, so that the goods can be used in accordance with the contract".
DCD	Article 6 (1) (d): The digital content shall "be updated as stipulated by the contract".	Article 6 (1) (c): The digital content shall "be supplied along with any instructions and customer assistance as stipulated by the contract".	Article 7: "Where the digital content is incorrectly integrated into the consumer's digital environment, any lack of conformity resulting from the incorrect integration shall be regarded as lack of conformity of the digital content if: (a) the digital content was integrated by the supplier or under the supplier's responsibility; or (b) the digital content was intended to be integrated by the consumer and the incorrect integration was due to shortcomings in the integration instructions where those instructions were supplied in accordance with point (c) of Article 6(1) or should have been supplied in accordance with Article 6(2)".	Article 8 (1): "At the time the digital content is supplied to the consumer, the digital content shall be free of any right of a third party, including based on intellectual property, so that the digital content can be used in accordance with the contract". Article 8 (2): "Where the digital content is supplied over a period of time, the supplier shall, for the duration of that period, keep the digital content supplied to the consumer free of any right of a third party,... so that the digital content can be used in accordance with the contract".
CESL	Article 103: "Digital content is not considered as not conforming to the	Article 100 (e): The goods or digital content must "be supplied along with	Article 101 (1): "Where goods or digital content supplied under a consumer sales	Article 102 (1): "The goods must be free from and the digital content must be cleared of any right or not obviously unfounded claim of a third party".

	<p>contract when an updated digital content has become available after the conclusion of the contract”.</p> <p>Article 105 (4): “Where the digital content must be subsequently updated by the trader, the trader must ensure that the digital content remains in conformity with the contract throughout the duration of the contract”.</p>	<p>such accessories, installation instructions or other instructions as the buyer may expect to receive”.</p>	<p>contract are incorrectly installed, any lack of conformity resulting from the incorrect installation is regarded as lack of conformity of the goods or the digital content if:</p> <p>(a) the goods or the digital content were installed by the seller or under the seller’s responsibility; or</p> <p>(b) the goods or the digital content were intended to be installed by the consumer and the incorrect installation was due to a shortcoming in the installation instructions”.</p> <p>Article 101 (2): “The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects</p>	<p>Article 102 (2): “As regards rights or claims based on intellectual property, subject to paragraphs 3 and 4, the goods must be free from and the digital content must be cleared of any right or not obviously unfounded claim of a third party:</p> <p>(a) under the law of the state where the goods or digital content will be used according to the contract or, in the absence of such an agreement, under the law of the state of the buyer's place of business or in contracts between a trader and a consumer the consumer's place of residence indicated by the consumer at the time of the conclusion of the contract; and</p> <p>(b) which the seller knew of or could be expected to have known of at the time of the conclusion of the contract”.</p> <p>Article 102 (3): “In contracts between businesses, paragraph 2 does not apply where the buyer knew or could be expected to have known of the rights or claims based on intellectual property at the time of the conclusion of the contract”.</p> <p>Article 102 (4): “In contracts between a trader and a consumer, paragraph 2 does not apply where the consumer knew of the rights or claims based on intellectual property at the time of the conclusion of the contract”.</p> <p>Article 102 (5): “In contracts between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects”.</p>
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	Obligation to achieve result and obligation of care and skill	Exclusion of liability for lack of conformity of goods and digital content	Exclusion of the seller's liability in third party rights
CISG		Article 35: “(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph (2) for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity”.	Article 42°: “(2) The obligation of the seller under the preceding paragraph does not extend to cases where: (a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or (b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer”.
CSD		Article 2 (3): “There shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer”.	
PSCL		Article 2 (3): “There shall be deemed not to be a lack of conformity for the purposes of this article, if, at the time the contract was concluded, the consumer was aware of the lack of conformity or could not reasonably be unaware of the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer”.	
OSD		Article 4° (3): “Any agreement excluding, derogating from or varying the effects of Articles 5 and 6 to the detriment of the consumer is valid only if, at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods and the consumer has expressly accepted this specific condition when concluding the contract”.	
DCD		Article 9 (2): “Paragraph 1 shall not apply where the supplier shows that the digital environment of the consumer is not compatible with interoperability and other technical requirements of the digital content and where the supplier informed the consumer of such requirements before the conclusion of the contract”. Article 9 (3): “The consumer shall cooperate with the supplier to the extent possible and necessary to determine the consumer's digital environment. The obligation to cooperate shall be limited to the technically available means which are the least intrusive for the	

		consumer. Where the consumer fails to cooperate, the burden of proof with respect to the non-conformity with the contract shall be on the consumer”.	
CESL	<p>Article 148 (1): The service provider must achieve any specific result required by the contract.</p> <p>Article 148 (2): In the absence of any express or implied contractual obligation to achieve a specific result, the service provider must perform the related service with the care and skill which a reasonable service provider would exercise and in conformity with any statutory or other binding legal rules which are applicable to the related service.</p> <p>Article 148 (3): “In determining the reasonable care and skill required of the service provider, regard is to be had, among other things, to:</p> <ul style="list-style-type: none"> (a) the nature, the magnitude, the frequency and the foreseeability of the risks involved in the performance of the related service for the customer; (b) if damage has occurred, the costs of any precautions which would have prevented that damage or similar damage from occurring; and (c) the time available for the performance of the related service”. 	<p>Article 99 (3): “In a consumer sales contract, any agreement derogating from the requirements of Articles 100, 102 and 103 to the detriment of the consumer is valid only if, at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods or the digital content and accepted the goods or the digital content as being in conformity with the contract when concluding it”.</p> <p>Article 99 (4): “In a consumer sales contract, the parties may not, to the detriment of the consumer, exclude the application of paragraph 3 or derogate from or vary its effects”.</p> <p>Article 103: “Digital content is not considered as not conforming to the contract for the sole reason that updated digital content has become available after the conclusion of the contract”.</p> <p>Article 104: “In a contract between traders, the seller is not liable for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of the lack of conformity”.</p>	<p>Article 102:</p> <p>(3) In contracts between businesses, paragraph 2 does not apply where the buyer knew or could be expected to have known of the rights or claims based on intellectual property at the time of the conclusion of the contract.</p> <p>(4) In contracts between a trader and a consumer, paragraph 2 does not apply where the consumer knew of the rights or claims based on intellectual property at the time of the conclusion of the contract.</p> <p>(5) In contracts between a trader and a consumer, the parties may not, to the detriment or the consumer, exclude the application of this Article or derogate from or vary its effects.”</p>

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